CARD 1

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 196.

GORHAM MANUFACTURING COMPANY,
Appellant,

against

JAMES A. WENDELL, individually and as Comptroller of the State of New York, and CHARLES D. NEWTON, individually and as Attorney General of the State of New York,
Appellees.

BRIEF IN REPLY TO RULE TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED AS TO JAMES A. WENDELL, INDIVIDUALLY AND AS COMPTROLLER OF THE STATE OF NEW YORK.

This brief is submitted jointly on behalf of the appellant and appellees. In this case a motion for substitution of the State Tax Commission of the State of New York as appellee in place of James

A. Wendell, the Comptroller of the State of New York, deceased, was submitted jointly on behalf of the appellant and appellees, on December 11, 1922.

On January 2, 1923, this Court entered the following order:

> "On consideration of the motion to substitute parties appellee, it is ordered that a Rule to Show Cause why the case as to the Comptroller should not be dismissed in view of Irwin v. Webb, decided March 20, 1922, and U. S. v. Butterworth, 169 U. S. 600, shall issue."

It appeared from said motion to substitute that James A. Wendell, the former Comptroller of the State of New York, as such an appellee herein, is dead and that by Laws of the State of New York 1921, Chapters 90 and 443, amending Article 9a of the Tax Law of the State of New York, all the powers and duties in regard to the collection and enforcement of payment of corporation taxes under said Article 9a which had been previously conferred upon the Comptroller of the State of New York were transferred to the State Tax Commission of the State of New York.

The above entitled suit was brought on the 7th day of October, 1919, in the United States District Court for the Southern District of New York by Gorham Manufacturing Company, a corporation organized and existing under the laws of the State of Rhode Island and a citizen of that State, against the Comptroller and the Attorney General of the State of New York, citizens of that State, praying judgment that the corporation tax against the

plaintiff under Article 9a of the said Tax Law amounting to $13,582.56, with any penalties thereon, be adjudged void and cancelled of record as contrary to the Constitution of the United States, and that the Comptroller and Attorney General of the State of New York be restrained from collecting such tax and penalties thereon. The decree appealed from was entered by the United States District Court for the Southern District of New York on the 12th day of August, 1921, after the trial of the case, dismissing the bill of complaint filed October 17, 1919, as amended on June 23, 1921, upon the merits. From such decree an appeal was allowed to this Court.

The question involved in the action is the constitutionality of Article 9a of the Tax Law of the State of New York, as imposing a tax to be computed upon an allocated part of the net income of foreign corporations, and the constitutionality of such tax assessed thereunder.

The parties hereto, through their counsel, made a stipulation, annexed to the motion to substitute, subject to the approval of the Court, to the effect that the Comptroller of the State having died and all the powers and duties of such Comptroller in relation to the taxation of corporations under Article 9a of the Tax Law of the State of New York having been transferred to the State Tax Commission by Laws of New York, 1921, Chapters 90 and 443, the State Tax Commission be substituted as defendant-appellee herein in the place and stead of the said Comptroller, and that the Attorney General of the State of New York appears herein for the State Tax Commission, and that all pleadings and proceedings herein stand with the same

force and effect as if the State Tax Commission had been originally a party hereto.

It is respectfully submitted that under the law of the State of New York the substitution of State officers in the place of their predecessors is justified and in accordance with the law and practice of the Courts of the State of New York. The law is well settled by the Court of Appeals of the State of New York that a mandamus proceeding against an officer is not a personal suit and does not abate upon the expiration of the term of such officer, but should be continued in the name of his successor in office. See

> *People ex rel. Broderick* v. *Morton,* 156 N. Y. 136,

where it was said, at page 148:

> "But there is no apparent reason why the provisions of the Code controlling actions and special proceedings against county, town and municipal officers, should not apply as well to state officers. The practice therein provided for is simple and affords ample protection to all parties. Section 1930 provides: 'In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution has been personally served upon him.' As we have seen, no substitution has been made in this case."

See also

People ex rel. Walker v. *Ahearn,* 200 N. Y. 146.

People ex rel. Collins v. *Ahearn,* 137 N. Y. App. Div. 260.

Attention is further called to the case of *Matter of Long Sault Development Company,* 212 N. Y. 1, which was a mandamus proceeding against John J. Kennedy as treasurer of the State of New York. This case was taken to the United States Supreme Court and is there reported in 242 U. S. 272, under the name of *Long Sault Development Company, plaintiff-in-error, against Homer D. Call (as successor of John J. Kennedy), as Treasurer of the State of New York, defendant-in-error.* The printed transcript of record in this Court in that case shows, at page 62, that the judgment of the New York Supreme Court on the amended remittitur of the Court of Appeals recited "that Homer D. Call, having succeeded said John J. Kennedy as Treasurer of the State of New York, now, on motion of Thomas Carmody, Attorney General, for Homer D. Call as State Treasurer, it is * * * adjudged that said Homer D. Call as Treasurer of the State of New York recover" (the costs).

It thus appears that there was a substitution in that mandamus proceeding, recognized by the Supreme Court of the United States, in the title of the case, of the successor to the former State Treasurer against whom such mandamus proceeding was instituted.

In *Saranac Land & Timber Co.* v. *Roberts,* 177 U. S. 318, the case was disposed of on the merits

in this Court after the expiration on December 31, 1898, of the term of office of James A. Roberts as Comptroller, the defendant-in-error, without the substitution of his successor.

See also *People ex rel. Lardner* v. *Carson,* 78 Hun 544 (N. Y. Supreme Court, General Term), holding that the duty prescribed by Section 1948 of the New York Code of Civil Procedure, in relation to actions by the People of the State of New York, is an official one pertaining to the office of the Attorney General and not to the person who at any time happens to be the incumbent of the office, and no substitution is necessary.

It should be noted that the case at bar is an equity suit to restrain the State officers from collecting such tax and enforcing the penalties for non-payment thereof; such penalty includes an action to annul the grant of the right to do business in the State. The provisions of the law make it the duty of the State Tax Commission to collect the tax and enforce the penalties for non-payment thereof. Both the State Tax Commission and the Attorney General of the State of New York, who took office on January 1, 1923, have declared their intention to enforce the collection of the tax here in question, and the penalties thereon, in a consent to substitution herein, set forth as follows:

"SUPREME COURT

OF THE UNITED STATES

No. 196. October Term, 1922.

Gorham Manufacturing Company,
Appellant,

against

James A. Wendell, individually and as Comptroller of the State of New York, and Charles D. Newton, individually and as Attorney-General of the State of New York,
Appellees.

Consent to Substitution.

The undersigned, the Tax Commission of the State of New York, and Carl Sherman, individually and as Attorney-General of the State of New York, hereby consent to be substituted as defendants-appellees in the above entitled action in the place and stead of their predecessors, respectively, the former Comptroller of the State of New York, James A. Wendell, and the former Attorney-General of the State of New York, Charles D. Newton, named as defendants above, and we certify that we intend to enforce against the appellant the tax which is the subject matter of this action in the same way and to the

same extent under the Statutes of the State of New York as did the former officers whose places we have taken by operation of law.

Dated, January 13, 1923.

CARL SHERMAN,
Individually and as Attorney-General of the State of New York.

(Seal of Attorney-General of the State of New York.)

STATE TAX COMMISSION OF THE STATE OF NEW YORK,
By: Walter W. Law, Jr.,
John J. Merrill,
State Tax Commissioners.

(Seal of the Tax Department of the State of New York.)"

On October 1, 1921, the new Civil Practice Act of New York, with its reformed and simplified procedure, took effect. Reference is made to the following quoted provisions of such Civil Practice Act as indicating a broad policy for the joining of all parties to any controversy who are necessary or proper for a determination thereof at any stage of the cause and as the ends of justice may require:

"Sec. 192. *Nonjoinder and misjoinder.* No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require.

"Sec. 193. *Determination of rights of parties before the court.* The court may determine the controversy as between the parties before it where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in. And where one of the parties to an action claims that a person not a party thereto is or will be liable wholly or in part, for the claim made against him in the action, the court on application of such party must direct such person to be brought in and direct the service upon such person of the pleading, alleging the claim against him. Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may, in any manner be affected, by the judgment, or in real property for injury to which the complaint demands relief, makes application to the court to be made a party, it must direct him to be brought in by the proper amendment. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the court otherwise directs.

"Sec. 211. *Joinder of defendants generally.* All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

> "Sec. 212. *Defendant need not be interested in all the relief claimed.* It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.
>
> "Sec. 213. *Where doubt exists as to who is liable.* Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

It is the opinion of the Attorney General of the State of New York, counsel for the appellees, and of counsel for the appellant, that under the law and practice of the Courts of the State of New York, a State officer may properly be substituted for his predecessor at any stage of the proceedings, and that the Courts of the State of New York would so order at any time on the request of the parties to the action or the successor to such State officer.

The Court below, in the case at bar, gave practical effect to the law of the New York Courts, under which successors to officers are substituted as parties defendant, by substituting James A. Wendell, the Comptroller named in the present title of this action, for his predecessor, Eugene M. Travis, against whom this action was originally brought (Transcript of Record, pp. 1 and 42, 43).

It is, therefore, asked that the motion for substitution of the State Tax Commission, in the place of James A. Wendell, who was Comptroller of the State of New York at the time of his death, be granted.

Dated, January 17, 1923.

Respectfully submitted,

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Gorham Manufacturing Company, Appellant.

CARL SHERMAN,
Attorney General of the State of New York,

C. T. DAWES,
Deputy Attorney General of the State of New York,
Counsel for Appellees.

(28,669)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 714.

BASS, RATCLIFF & GRETTON, LIMITED, PLAINTIFF IN ERROR,

vs.

STATE TAX COMMISSION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

Statement under Rule 41.

This proceeding was commenced by the filing of a notice and petition for writ to issue on or about August 10, 1920, upon which petition an order was entered directing issuance of writ on August 30, 1920. Thereupon, on August 30, 1920, the writ of certiorari was duly issued.

Respondent, on October 10, 1920, served and filed its return to said writ.

Relator appeared by Olney & Comstock and respondent by Hon. Charles D. Newton, Attorney General of the State of New York. There has been no change of parties or of attorneys.

2 *Writ of Certiorari.*

The People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, to the State Tax Commission:

Whereas, we have been informed by the petition of Bass, Ratcliff & Gretton, Limited, verified the 10th day of August, 1920, as more fully appears in said petition, that said petitioner is a corporation organized under the laws of England, and, on the 3rd day of February, 1898, was duly authorized to conduct business within the State of New York, and ceased so to conduct its business within this State on the 6th day of November, 1918, and

That heretofore and on or about the 25th day of February, 1919, the State Tax Commission assessed a tax against the said petitioner in the sum of Eight hundred twenty-six and 14/100 ($826.14) Dollars, under the provisions of Article 9A of the Tax Law, and

That thereafter and on or about the 26th day of September, 1919, your petitioner filed a formal application with the State Tax Commission for a revision of the taxes so assessed against it, and

That thereafter and on or about the 28th day of July, 1920, the said State Tax Commission, after granting the request of the application of the said Petitioner for a rehearing and revision of said tax, rendered its determination in writing, affirming the said
3 original assessment of tax against the said Petitioner in the sum of Eight hundred twenty-six and 14/100 ($826.14) Dollars, and served a copy of the said determination upon Petitioner by mail, copy of said determination being received by said Petitioner on or about the 29th day of July, 1920, and

That for the said taxable period for which the said tax was so assessed against the said Petitioner by the said State Tax Commission, the said Petitioner had no taxable income and no income upon which it paid tax to the United States Government, and was not engaged in business in the State of New York for the period for which the tax was assessed and ceased to do business on or about the sixth day of November, 1918, and

That said Petitioner has paid the said tax under protest to the State Tax Commission, and has filed with said Commission a bond and undertaking required by law, and

That by reason of the foregong matters and things injustice has been done to said Bass, Ratcliff & Gretton, Limited, in that said determination and assessment of the said Tax Commission is erroneous and inequitable for the reasons that the law under which said tax is assessed is in violation of the constitution of the United States and of the constitution of the State of New York, and in that, among other things, it deprives the persons so taxed of their property without due process of law and without just compensation; that it denies to said persons the equal protection of the laws and attempts illegally to impose a tax upon a tax imposed and assessed

4 by the Government of the United States and imposes an unequal tax and illegally discriminates against certain of the persons so taxed and in favor of certain other persons so taxed; and upon the further ground that inasmuch as your Petitioner is a foreign corporation organized under the laws of England, that the said tax is in violation of the comity of nations; that the assessment and determination of the State Tax Commission fails to give consideration to the business and property of the corporation not employed in the United States or the State of New York, and upon the further ground that the said assessment and determination and the said tax is computed upon a part of the income of your petitioner represented by its earnings made outside of the United States of America and is, therefore, in contravention of the directions and provisions of the Act in question in that the said tax and assessment and determination are not based upon the amount of income reported to the Federal Government of the United States under the Income Tax Law of the United States, and are not computed upon the basis of your petitioner's net income, upon which income your petitioner was required to pay a tax to the United States, and

That said Petitioner, among other things, prays that a writ of certiorari issue out of this Court to review the said proceedings had by and the determination of the said State Tax Commission to the end that the error, injustice and inequality above alleged may be corrected and that the said determination of the said State Tax Commission may be corrected and that the said determination of the said State Tax Commission may be reviewed and reversed and the errors aforesaid corrected in accordance with law, and

5 the said assessment vacated and set aside and the tax paid by said Petitioner in the sum of $826.14 be refunded;

Now, we being willing for said causes to be certified of your proceedings as such State Tax Commission in making said assessment,

determination and tax, determination and affirming the tax against the said Petitioner in the sum of $826.14, and of all things relating thereto, do command you that within twenty days after the service of this writ upon you, you certify and return to us in the office of the Clerk of the County of Albany, in the City of Albany, to the end that your said determination, assessment and action may be reviewed and corrected on the merits by this Court and may be reversed and the errors aforesaid corrected in accordance with law:

(1) All and singular the proceedings had by the said State Tax Commission relating to the assessment and determination of the tax against it by the State Tax Commission, based on its business for the year ending June 30, 1918, under Article 9-A of the Tax Law, Section 214.

(2) All and singular the papers, affidavits and evidence submitted by your Petitioner and filed with the said State Tax Commission, together with all other papers, affidavits, evidence, data, writings, memoranda, matters and information, if any, before the State Tax Commission and considered by it, and upon which it arrived at its determination and conclusion as to said assessment and tax, or if there be no such other papers, affidavits, evidence or other data or information, a statement to that effect.

(3) A statement of the method by which the said State Tax Commission made its determination and assessment, and the
6 grounds thereof, and the bases or principles upon which the same were made.

(4) That the said State Tax Commisison be directed to serve a copy of its return upon Olney & Comstock, attorneys for your Petitioner, within twenty days after service of a writ upon said State Tax Commisison, and that your Petitioner have such other and further order and relief as to this Court may seem just and proper.

Witness, the Honorable Philip J. McCook, one of the Justices of the Supreme Court of the State of New York, at the County Court House, Borough of Manhattan, City of New York, on the 30th day of August, 1920.

By the Court,

[Seal New York.] WM. F. SCHNEIDER,
Clerk.

OLNEY & COMSTOCK,
Attorneys for Relator.

Office and Post Office Address,
68 William Street,
Borough of Manhattan,
City of New York.

The foregoing Writ is allowed this 30th day of August, 1920.

PHILIP J. McCOOK,
Justice of the Supreme Court of State of New York.

7 To the State Tax Commission.

GENTLEMEN:

Please take notice that a Writ of Certiorari, of which the foregoing is a copy, has been duly granted and that the original now exhibited to you will be forthwith filed in the office of the Clerk of the County of Albany.

Dated, Albany, New York, August —, 1920.

OLNEY & COMSTOCK,
Attorneys for Relator.

Office and Post Office Address,
68 William Street,
Borough of Manhattan,
New York City.

8 *Order Directing Writ to Issue.*

At a Special Term of the Supreme Court of the State of New York, Part I Thereof, Held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 30th Day of August, 1920.

Present: Honorable Philip J. McCook, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

An Application having regularly come on to be heard before me on the 24th day of August, 1920, for a writ of certiorari on the petition of Bass, Ratcliff & Gretton, Limited, verified the 10th day of August, 1920, and upon reading and filing the said petition and the notice of application therefor, and upon due proof of service of said notice of application and said petition on the State Tax Commission, and no one appearing in opposition thereto, now, on motion of Olney & Comstock, attorneys for the Relator, it is

Ordered that a Writ of Certiorari as prayed for in said petition be allowed and issued, directed to the State Tax Commission,
9 and that said Writ be allowed, signed and sealed by the Clerk of this Court in and for the County of New York, and be returnable within twenty days after service thereof on the said State Tax Commission at the office of the Clerk of the Supreme Court in and for the County of Albany, City of Albany, State of New York.

Enter in Albany County.

P. J. McCOOK,
J. S. C.

Notice of Motion for Writ of Certiorari.

Supreme Court, State of New York, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

SIRS:

Please take notice that the undersigned, by Olney & Comstock, its attorneys, on the annexed petition verified the 10th day of
10 August, 1920, will move this Court, at Special Term, Part I thereof, to be held in and for the County of New York in the County Court House, Borough of Manhattan, City of New York, on the 24th day of August, 1920, at 10.15 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an Order directing the issuance of a Writ of Certiorari and for a Writ of Certiorari in accordance with the prayer of said petition, directed to you, commanding that you, the said State Tax Commission, certify and return to this Court, at the office of the Clerk of the County of Albany, in the City of Albany, to the end that said assessment and determination and action of said State Tax Commission may be reviewed and corrected on the merits by this Court, and that the said assessment and determination of the said State Tax Commission may be reversed and the errors aforesaid corrected in accordance with the law:

(1) All and singular the proceedings had by the said State Tax Commission relating to the assessment and determination of the tax against it by the State Tax Commission, based on its business for the year ending June 30, 1918, under Article 9-A of the Tax Law, Section 214.

(2) All and singular the papers, affidavits and evidence submitted by your petitioner and filed with the said State Tax Commission, together with all other papers, affidavits, evidence, data, writings, memoranda, matters and information, if any, before the State Tax Commission and considered by it, and upon which it arrived at its determination and conclusion as to said assessment and tax, or if there be no such other papers, affidavits, evidence or other data or information, a statement to that effect.

11 (3) A statement of the method by which the said State Tax Commission made its determination and assessment, and the grounds thereof, and the bases or principles upon which the same was made.

(4) That the said State Tax Commission be directed to serve a copy of its return upon Olney & Comstock, attorneys for your petitioner, within twenty days after service of a writ upon said State

Tax Commission, and that your petitioner have such other and further order and relief as to this Court may seem just and proper.

BASS, RATCLIFF & GRETTON,
LIMITED, *Petitioner*,
By OLNEY & COMSTOCK,
Attorneys.

To:
State Tax Commission.
Attorney-General.

12 *Petition for Writ.*

Supreme Court, State of New York, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

To the Supreme Court of the State of New York:

The petition of Bass, Ratcliff & Gretton, Limited, by Olney & Comstock, its attorneys, respectfully shows:

1st. That your petitioner was at all the times hereinafter mentioned, and still is, a corporation organized and existing under the laws of England, and that it was duly authorized on the 3rd day of February, 1898, to do business in this State, and fully complied with all the provisions of Section 15 of the General Corporation Law and duly paid all taxes due by it to be paid under Section 182 and under Article 9-A of the Tax Law. That said Company ceased to do business within the State of New York on the 6th day of November, 1918, and formally surrendered its certificate of authority to do business in this State by instrument executed the 28th day of January, 1920.

13 2nd. That the State Tax Commission was at the time of the hearing and decision hereinafter mentioned, and still is, a body duly appointed, organized and existing under the laws of this State and duly authorized to entertain before it the proceedings hereinafter mentioned.

3rd. That heretofore and on or about the 8th day of August, 1918, your petitioner filed with the State Tax Commission a franchise tax report under Article 9-A of the Tax Law, copy of which is hereto annexed, made part hereof and marked Exhibit A. That thereafter and on or about the 7th day of February, 1919, the State Tax Commission wrote to petitioner directing its attention to the necessity of furnishing information regarding its entire net income, a copy of which letter is hereto annexed, made part hereof and marked Exhibit B. That thereafter and on or about September 5,

1919, your petitioner filed with the State Tax Commission an amended report, copy of which is hereto annexed, made part hereof and marked Exhibit C, and protest against making said return, copy of which is hereto annexed, made part hereof and marked Exhibit D, together with letter from counsel for petitioner under date of September 5, 1919, copy of which is hereto annexed, made part hereof and marked Exhibit E.

4th. That thereafter and on or about the 25th day of February, 1919, the State Tax Commission assessed a tax against your petitioner in the sum of $826.14 and rendered bill to your petitioner for the same. That on or about the 26th day of September, 1919, your petitioner filed a formal application with the State Tax Commission for a revision of the taxes assessed against it, a copy of which
14 application is hereto annexed, made part hereof and marked Exhibit F, and also communicated through counsel on or about the same date with the State Tax Commission by letter dated September 26, 1919, copy of which is hereto annexed, made part hereof and marked Exhibit G. That thereafter and under date of October 11, 1919, the State Tax Commission communicated with your petitioner acknowledging receipt of the application for revision of tax and advising that hearing on such application would be granted, a copy of which letter is hereto annexed, made part hereof and marked Exhibit H. That thereafter and on or about the 18th day of October, 1919, the said tax assessed against your petitioner in the sum of $826.14 was paid by petitioner, under protest upon the grounds set forth therein, said protest being addressed to the State Tax Department of New York and to the State Comptroller of Albany, New York, copy of which protest is hereto annexed, made part hereof and marked Exhibit I. That thereafter and on or about the 13th day of November, 1919, there was filed by your petitioner with the State Tax Commission an affidavit and statement showing that your petitioner did not intend to do business in the State of New York for the tax year beginning November 1, 1919, accompanied by a letter from counsel of your petitioner under date of November 13, 1919, copies of which said statement and affidavit are hereto attached, made part hereof and marked Exhibit J, and copy of said letter being hereto annexed, made part hereof and marked Exhibit K. In reply thereto the State Tax Commission wrote to your petitioner under date of December 8, 1919, copy of which letter is hereto annexed, made part hereof and marked Exhibit L. In reply your petitioner wrote the State Tax Commission, through counsel,
15 under date of December 10, 1919, inquiring as to whether or not the State Tax Commission required evidence that your petitioner's certificate of authority to do business in this State had been revoked before it would entertain an affidavit showing that the Company no longer intended to do business in this State, a copy of which letter is hereto attached, made part hereof and marked Exhibit M. That in reply to this letter of December 10, 1919 (Exhibit M), State Tax Department wrote under date of December 18, 1919, that if the affidavit suggested was filed with the Department, no fran-

chise tax would be assessed, copy of which letter is hereto attached, made part hereof and marked Exhibit N. That thereafter and on or about the 24th day of December, 1919, your petitioner filed with the State Tax Commission an affidavit drawn in accordance with the suggestion of the State Tax Department's letter of December 8, 1919 (Exhibit L), accompanied by letter from counsel under date of December 24, 1919, which said affidavit is hereto annexed and made part hereof and marked Exhibit O, and which said letter is hereto annexed, made part hereof and marked Exhibit P. That the enclosure referred to in said letter, being a letter to the Secretary of State, is also annexed hereto and made part hereof and marked Exhibit Q. That thereafter several communications passed between your petitioner, through counsel, and the State Tax Commission, requesting a date for hearing on its application for revision of tax, and that thereafter hearing was set for and held before the State Tax Commission on the 19th day of May, 1920, and that thereafter, in reply to a question asked at the time of the hearing, your petitioner wrote the State Tax Commission, through counsel, under date of
16 May 21, 1920, advising that there were no local assessments against it, a copy of which letter is hereto attached, made part hereof and marked Exhibit R. That in the meantime, and on or about the 18th day of February, 1920, there was filed with the Secretary of State, State of New York, a formal certificate of surrender of authority to your petitioner to do business in this State and the original certificate of authority was returned.

5th. That thereafter the State Tax Commission proceeded to make its determination upon the application of petitioner for revision of the tax assessed against it, and on or about the 28th day of July, 1920, made such determination in writing affirming such original assessment of tax in the sum of $826.14. A copy of said determination is hereto attached, made part hereof and marked Exhibit S, and the letter accompanying said determination from the State Tax Department is also hereto attached, made part hereof and marked Exhibit T. Said determination and letter (Exhibits S and T) were received by your petitioner on or about the 29th day of July, 1920. Thirty days have not elapsed since said date.

6th. Your petitioner further shows and alleges that the assessment of the said tax and determination by the said State Tax Commission, as hereinabove set forth, is erroneous and inequitable, for the reasons that the law under which said tax is assessed is in violation of the Constitution of the United States and the Constitution of the State of New York, and in that, among other things, it deprives the persons so taxed of their property without due process of law and without just compensation; that it denies to said persons the equal protection of the laws and attempts illegally to impose a tax
17 upon a tax imposed and assessed by the Government of the United States, and imposes an unequal tax and illegally discriminates against certain of the persons so taxed and in favor of certain other persons so taxed; and upon the further ground that inas-

much as your petitioner is a foreign corporation organized under the laws of England, that the said tax is in violation of the comity of nations; that the assessment and determination of the State Tax Commission fails to give consideration to the business and property of the corporation not employed in the United States or the State of New York, and upon the further ground that the said assessment and determination and the said tax is computed upon a part of the income of your petitioner represented by its earnings made outside of the United States of America and is, therefore, in contravention of the directions and provisions of the Act in question in that the said tax and assessment and determination are not based upon the amount of income reported to the Federal Government of the United States under the Income Tax Law of the United States, and are not computed upon the basis of your petitioner's net income, upon which income your petitioner was required to pay a tax to the United States.

Wherefore, your petitioner prays that a writ of certiorari may be issued and allowed by this Court, directed to the State Tax Commission, commanding it to certify and return to this Court, in the office of the Clerk of the County of Albany in the City of Albany, to the end that said assessment and determination and action of said State Tax Commission may be reviewed and corrected on the merits by this Court, and that the said assessment and determination of the said State Tax Commission may be reversed and the errors aforesaid corrected in accordance with the law:

(1) All and singular the proceedings had by the said State Tax Commission relating to the assessment and determination of the tax against it by the State Tax Commission, based on its business for the year ending June 30, 1918, under Article 9-A of the Tax Law, Section 214.

(2) All and singular the papers, affidavits and evidence submitted by your petitioner and filed with the said State Tax Commission, together with all other papers, affidavits, evidence, data, writings, memoranda, matters and information, if any, before the State Tax Commission and considered by it, and upon which it arrived at its determination and conclusion as to said assessment and tax, or if there be no such other papers, affidavits, evidence or other data or information, a statement to that effect.

(3) A statement of the method by which the said State Tax Commission made its determination and assessment, and the grounds thereof, and the bases or principles upon which the same was made.

(4) That the said State Tax Commission be directed to serve a copy of its return upon Olney & Comstock, attorneys for your petitioner, within twenty days after service of a writ upon said State Tax Commission, and that your petitioner have such other and further order and relief as to this Court may seem just and proper.

19 No previous application for this or similar relief has heretofore been made. Bond required by law has been filed.
Dated, New York, August 10, 1920.

(S.) BASS, RATCLIFF & GRETTON, LIMITED,
By CHARLES H. TAYLOR,
Petitioner.

OLNEY & COMSTOCK,
Attorneys for Relator.

Office and Post Office Address,
68 William Street,
Borough of Manhattan,
City of New York,
New York.

20 STATE OF NEW YORK,
County of New York, ss:

Charles H. Taylor, being duly sworn, deposes and says that he is the agent and attorney-in-fact (for the purpose of executing and verifying this Petition) of the Petitioner in this action; that he has read the foregoing Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

This verification is made by deponent and not by Bass, Ratcliff & Gretton, Limited, for the reason that Bass, Ratcliff & Gretton, Limited, is a foreign corporation, of which deponent is an officer, to wit, its agent and attorney-in-fact. That all the material allegations of this Petition are within deponent's knowledge.

(S.) CHARLES H. TAYLOR.

Sworn to before me this 10th day of August, 1920.
(S.) GEORGE F. BENTLEY,
[Notarial Seal.] *Notary Public* (102), *New York Co.*

21 EXHIBIT A.

Report to State Tax Commission.

1918.

State of New York.

Taxation of Corporate Franchises under Article 9-*a* of the Tax Law for the Tax Year Beginning November 1, 1918.

This report is due July 1, 1918, or within thirty days after filing report with the United States Treasury Department.
File with State Tax Department, Albany, N. Y.

As American Manager of the British Corporation of Bass, Ratcliff & Gretton, Limited, I make the following report of such company for the fiscal year ending June 30, 1918, pursuant to Article 9-*a* of the Tax Law:

(1) Organized Jan. 13, 1888, under the Laws of Great Britain.

(2) Began business in New York, March, 1897.

(3) Issued capital stock, $13,600,000.

(If organized with shares without par value, insert the amount of paid-in capital.)

(4) Amount of indebtedness at end of year, $ nil.

(5) Net income for the fiscal year ending June 30, 1918, as reported to the United States Treasury Department, None.

Corporations organized under the laws of foreign countries should return their entire net income—Unable to ascertain.

22 (6) If the amount reported above is not correct, state the amount claimed to be correct.

(7) Nature of business and how transacted—Importation and sales of ale.

(8) Place, street and number where such business is conducted—90 Warren Street, New York City.

(9) Where will mail reach the company? 90 Warren Street, New York City.

(10) State the city or town, street number and state where this company maintained any store, warehouse, factory or other place of business outside the State of New York—115 West Grand Ave., Chicago, Ill., also has principal office at Burton-on-Trent, England, and many other places in different parts of the world.

(11) Any corporation taxable hereunder may omit from this report the segregation of assets on this page only by signing the following consent:

I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income.

NOTE.—The foregoing lines commencing (11) "any corporation taxable hereunder, etc.," and ending "taxed upon its entire net income," were all struck out in the original report filed.

CHARLES H. TAYLOR,
American Manager.
(Official title.)

Do not sign consent unless taxable by the State of New York on entire income.

23 Total Segregated Assets Wherever Located in U. S. of America.

Average monthly value of bills and accounts receivable for—	
(*a*) Personal property manufactured by it.....	$21,534.15
(*b*) Personal property sold by the corporation from merchandise owned by it at the time of acceptance of order but not manufactured by it....	None.
(*c*) Services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.....	None.
Average monthly value of all real property wherever located (actual value).....	None.
Average monthly value of all its tangible personal property wherever located (actual value)....	24,829.23
Total	.....
Average total actual value of shares of stocks of other corporations owned by this corporation.....	.....

24 Assets Segregated to New York State Only.

Average monthly value of bills and accounts receivable for—	
(*a*) Personal property manufactured by it within this state	.....
(*b*) Personal property sold by it from merchandise owned by it and located in this state at the time of acceptance of the order, but not manufactured by it within this state.....	20,449.29
(*c*) Services performed, based on orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property at a place of business maintained by the corporation within this state	.....
Average monthly value of its real property within this state as detailed in this report (actual value)	.....
Average monthly value of its tangible personal property in New York State as detailed in this report (actual value).....	23,668.33
Total	.....
Average total actual value of shares of stocks of other corporations owned by it and allocated to this State by rule below.....	.....

25 *Instruction.*

If the company's entire real and personal property in this state is in one city, or in one town outside a city or incorporated village, the schedules below need not be made, but the name of the city or town, and of the county where located must be entered in panel 3.

City or Town, New York, New York County. 3.

Affidavit of President, Vice President, Secretary or Treasurer.

On this 2nd day of August, A. D. 1918, personally appeared before me, a Notary Public in and for the County of New York, C. H. Taylor, American Manager of the above named company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes a true statement of the annual net income of said company for the year.

CHARLES H. TAYLOR,
American Manager.
(Official title.)

Sworn to before me the day and year aforesaid.
[Notarial Seal.] GEORGE F. BENTLEY,
Notary Public (102), *New York County.*

26 EXHIBIT B.

State of New York,

Tax Department,

Albany.

State Tax Commission

Walter H. Knapp, President.

Ralph W. Thomas.

John J. Merrill.

Corporation Tax Bureau.

Newell W. Canfield,

Acting Deputy Commissioner.

Bass, Ratcliff & Gretton, Ltd.,
90 Warren Street,
New York City.

February 7, 1919.

GENTLEMEN:

The report of this company under Article 9-A of the tax law for the tax year beginning November 1, 1918, fails to include the necessary information upon which to base the franchise tax.

An additional blank is herewith enclosed, and your attention is directed to the necessity of furnishing the information required regarding the entire net income of corporations organized under the laws of foreign countries, and unless the consent of the company is given to taxation upon such entire net income, the segregation of assets should be included.

Respectfully yours,

STATE TAX DEPARTMENT,
(S.) By N. W. CANFIELD,
Deputy Commissioner.

N. W. C./D.
Enc.

27 EXHIBIT C.

Amended Report.

Amending Report Hereto and on August 8, 1918, Filed.

File with State Tax Department, Albany, N. Y.

Taxation of Corporate Franchises under Article 9-*a* of the Tax Law for the Tax Year Beginning November 1, 1919.

This report is due July 1, 1919, or within thirty days after filing report with the United States Treasury Department.

As American Manager of the British Corporation of Bass, Ratcliff & Gretton, Limited, I make the following report of such company for the year ending June 30th, 1918, pursuant to Article 9-*a* of the Tax Law. (Date inserted above must be the same as given in answer to (7) below.)

(1) Organized Jan. 13, 1888, under the Laws of Great Britain.

(2) Began business in New York March, 1897.

(3) If not incorporated under laws of New York, has it been authorized to do business in New York State? ——.

(4) Authorized capital stock, $—.

(5) Issued capital stock, $13,600,000.

(6) Amount of indebtedness at end of fiscal year, $12,698,200.00

(7) Net income for the year ending June 30th, 1918, reported to United States Treasury Department—None.

NOTE.—The date used must be that of the last period ending on or before June 30, 1919, for which a report was made to the Federal government.

28 (8) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned, $2,185,600.00.

(9) If the amount reported above is inaccurate, state the amount claimed to be correct, $—.

(10) Nature of business and how transacted—Importation and sales of ale.

(11) Place, street and number where such business is conducted—90 Warren St., New York City.

(12) Where will mail reach the company—90 Warren Street, New York City.

(13) State the city or town, street number and state where this company maintained any store, warehouse, factory or other place of business outside the State of New York—115 West Grand Ave., Chicago, Ill., also has principal office at Burton-on-Trent, England, and many other places in different parts of the world.

(14) Any corporation taxable hereunder may omit from this report the segregation of assets on this page only by signing the following consent:

I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income at 4½% or upon its entire issued capital stock at one mill on the dollar, as provided by law.

29 NOTE.—The foregoing lines commencing (14) "any corporation taxable hereunder, etc.." and ending "as provided by law," were all struck out in the original report filed.

——— ———,
——— ———.
(Official title.)

Do not sign consent unless taxable by the State of New York on entire income or entire issued capital stock.

Total Segregated Assets Wherever Located.

(*a*) Average monthly value of bills and accounts receivable for personal property manufactured by it	$321,625.00
(*b*) Average monthly value of bills and accounts receivable for personal property sold by the corporation from merchandise owned by it at the time of acceptance of order but not manufactured by it.....	None.
(*c*) Average monthly value of bills and accounts receivable for services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.	None.

Average monthly value of all its real property wherever located (actual value)	785,675.00
30	
Average monthly value of all its tangible personal property wherever located (actual value)	2,105,105.00
Total	
Average total actual value of shares of stocks of other corporations owned by this corporation	845,195.00

Assets Segregated to New York State Only.

(*a*) Average monthly value of bills and accounts receivable for personal property manufactured by it within the state	None.
(*b*) Average monthly value of bills and accounts receivable for personal property sold by it from merchandise owned by it and located in this state at the time of acceptance of the order, but not manufactured by it within the state	20,449.29
(*c*) Average monthly value of bills and accounts receivable for services performed, based on orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property at a place of business maintained by the corporations within this state	None.
Average monthly value of its real property within this State as detailed in this report (actual value)	None.
31	
Average monthly value of its tangible personal property in New York State as detailed in this report (actual value)	23,668.33
Total	
Average total actual value of shares of stocks of other corporations owned by it and allocated to this state by rule below	

City or Town, ——, New York County. 3.

Instruction.

If the company's entire real and tangible personal property in this state is in one city, or in one town outside a city or incorporated

village, the schedules below need not be made, but the name of the city or town, and of the county where located must be entered in panel 3.

32 *Affidavit of President, Vice President, Secretary or Treasurer.*

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of September, A. D. 1919, personally appeared before me, a Notary Public in and for the County of New York, Charles H. Taylor of the above named company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes a true statement of the annual net income of said company for the year.

(Signed) CHARLES H. TAYLOR,
American Manager.
(Official title.)

Sworn to before me the day and year aforesaid.

[SEAL.] GEORGE F. BENTLEY,
Notary Public, 102, *New York Co.*

33 EXHIBIT D.

We hereby protest against the making of this return and any assessment for taxes and any attempt to collect taxes under any of the provisions of Article 9-A of the Tax Law, Chapter Sixty of the Consolidated Laws of the State of New York, being Chapter 62 of Laws of the State of New York for the year 1909, as amended, said Article 9-A being added thereto by Chapter 726 of the Laws of 1917 and amended by Chapter 417 of the Laws of 1918, upon the grounds, among others, that such law is in violation of the Constitution of the United States and the Constitution of the State of New York in that, among other things, it deprives the persons so taxed of their property without due process of law and without just compensation, and denies to such persons the equal protection of the laws and that it attempts illegally to impose a tax upon a tax imposed and assessed by the Government of the United States and imposes an unequal tax and illegally discriminates against certain of the persons so taxed and in favor of certain other persons so taxed; and also upon the further ground that inasmuch as this corporation is a foreign corporation, organized under the Laws of Great Britain, that it is in violation of the comity of nations; that consideration should be given to the business and property of the corporation not in or employed in the United States or the State of New York.

Dated, September 5th, 1919.

(Signed) BASS, RATCLIFF & GRETTON, LTD.,
By CHARLES H. TAYLOR,
American Manager.

34 EXHIBIT E.

September 5, 1919.

State Tax Department.

DEAR SIRS:

In the matter of the report of Bass, Ratcliff & Gretton, a British corporation, for the fiscal year ending June 30, 1918, in answer to yours of February 7, 1919, we are enclosing an amended report furnishing the information as to its income everywhere and as to its assets everywhere.

The figures in the report are based upon a value of the English pound sterling at $5 American money.

Yours respectfully,

(S.) OLNEY & COMSTOCK.

G. C. C./W. V. K.
(Enclosure.)

35 EXHIBIT F.

State of New York.

Tax Department.

Corporation Tax Bureau.

In the matter of the Application of BASS, RATCLIFF & GRETTON, LTD., for a Revision of Taxes Assessed Against It under Article IX-A of the Tax Law for the Year Beginning November 1, 1918.

To the New York State Tax Commission.

Pursuant to Section 218 of the Tax Law, application is hereby made by Bass, Ratcliff & Gretton, Ltd., a foreign corporation, having an office in the United States of America, at 90 Warren Street, in the Borough of Manhattan, in the County of New York, for a revision of the taxes assessed against it, pursuant to Article IX-A of the Tax Law, such taxes being audited and stated in a bill received by the applicant herein from the State Comptroller, dated September 25th, 1919, and a hearing is hereby respectfully requested for the purpose of revising said account so audited and stated.

The applicant herein respectfully objects to the payment of the said taxes assessed pursuant to Article IX-A so far as the same is computed upon such part of the income as is represented by the earnings of the Company made outside of the United States
36 of America, and also in so far as the same is not computed upon the amount of income reported to the Federal Government of the United States under the Income Tax Law of the United States, and respectfully requests that the tax be assessed at the

minimum percentage upon that part of the capital stock of the Company as is employed within the United States of America.
Dated, N. Y., September 26,1919.

Respectfully,

BASS, RATCLIFF & GRETTON, LTD.,
(S.) By CHARLES H. TAYLOR,
United States Manager Applicant,
By OLNEY & COMSTOCK,
Attorneys for Applicant.

Office & P. O. Address,
68 William Street,
Borough of Manhattan,
New York City.

37

EXHIBIT G.

September 26, 1919.

State Tax Commission,
Albany, N. Y.

DEAR SIRS:

We are sending you herewith a request for revision of the tax assessed upon Bass, Ratcliff & Gretton, for the period ending October 31, 1919, the bill for which is dated September 25, 1919. The reason we are asking for this revision is because we think, under the Act, your method of computation is wrong, namely, that you ascertain the proportion of percentage of the income taxable, as the assets in New York are to the assets everywhere and then—and this is where we think you are in error—assess the tax upon the percentage so found of the entire net income of the corporation, although it appears from the return that, as to the United States of America and as reported to the United States Treasury Department, there was no net income to the corporation from its business in the United States, but on the contrary there was a deficit.

We wish to test this question by proper proceedings in court, but we do not feel that, technically, we should begin these proceedings until we have asked you to revise and you have passed upon such request. We would also ask for an early date for the reason that, under the Act, unless this tax is paid within thirty days from the date of the bill—which is September 25th—a penalty of 10% is added automatically, and we would like to have you pass upon our request for revision so that we may begin our certiorari proceedings before such thirty days begin to run.

Thanking you in advance, we are

Yours respectfully,

(S.) OLNEY & COMSTOCK.

GCC/WVK.

38 EXHIBIT H.

State Tax Commission.

Walter H. Knapp, President.

John J. Merrill.

M J. Walsh.

Corporation Tax Bureau.

Newell W. Canfield,

Deputy Commissioner.

State of New York,

Tax Department,

Albany.

October 11 1919.

A 50746.

Bass, Ratcliff & Gretton,
Care of Olney & Comstock,
68 William Street,
New York City.

GENTLEMEN:

The department acknowledges receipt of your letter of September 26th.

Pursuant to such application a hearing will be granted in reference to the franchise tax assessed on report for the tax year beginning November 1, 1918, and you will be duly notified of the date of same when set. This matter will be reached in due course but evidently cannot be held within the time suggested.

Respectfully yours,

STATE TAX DEPARTMENT,

(S.) By N. W. CANFIELD,
Deputy Commissioner.

NWC/D.

39 EXHIBIT I.

To the State Tax Department of New York and
To the State Comptroller at Albany, N. Y.

DEAR SIRS:

We are enclosing check for the payment of bill rendered by you to us under date of September 25, 1919, as a franchise tax under Article 9A of the Tax Law, and amounting to $826.14.

We are sending this to you under protest upon the ground that any assessment for taxes and any attempt to collect taxes under the

provisions of Article 9A of the Tax Law, Chapter 60 of the Consolidated Laws of the State of New York, being Chapter 62 of the Laws of the State of New York for the year 1909, as amended, said Article 9A being added thereto by Chapter 726 of the Laws of 1917 and amended by Chapter 417 of the Laws of 1918, upon the grounds, among others, that such law is in violation of the Constitution of the United States and the Constitution of the State of New York, in that, among other things, it deprives the persons so taxed of their property without due process of law and without just compensation, and denies to such persons the equal protection of the laws and that it attempts illegally to impose a tax upon a tax imposed and assessed by the Government of the United States and imposes an unequal tax and illegally discriminates against certain of the persons so taxed and in favor of certain other persons so taxed; also upon the ground that the said tax is computed upon such part of the income as is represented by the earnings of the company made outside of the United States of America and therefore is not in accordance with the directions of the Act in question in that the same is not computed upon the amount of income reported
40 to the Federal Government of the United States under the Income Tax Law of the United States, and upon the further ground that application has been made with the New York State Tax Commission for revision of the assessment upon which the said tax is based or computed, and that such revision is still pending and undetermined.

Dated, New York, Oct. 18, 1919.

BASS, RATCLIFF & GRETTON, LTD.
(S.) By OLNEY & COMSTOCK.

EXHIBIT J.

File with State Tax Department, Albany, N. Y.

Taxation of Corporate Franchises under Article 9-*a* of the Tax Law for the Tax Year Beginning November 1, 1919.

This report is due July 1, 1919, or within thirty days after filing report with the United States Treasury Department.

As American Manager of the British Corporation of Bass, Ratcliff & Gretton, Limited, Company, I make the following report of such company for the year ending June 30th, 1918, pursuant to Article 9-A of the Tax Law.

41 (Date inserted above must be the same as given in answer to (7) below.)

(1) Organized Jan. 13, 1888, under the Laws of Great Britain.

(2) Began business in New York March, 1897.

(3) If not incorporated under laws of New York, has it been authorized to do business in New York State? ——.

(4) Authorized capital stock $——.

(5) Issued capital stock, $——.

(If organized with shares without par value, insert the amount of paid-in capital.)

(6) Amount of average indebtedness for year, $——.

(7) Entire net income for the year ending ——— —, 191-, as shown by its report to United States Treasury Department, before any deduction for excess profit or normal income tax has been made, $——.

NOTE. The date used must be that of the last period ending on or before June 30, 1919, for which a report was made to the Federal government.

(8) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned, $——.

(9) If the amount reported above is inaccurate, state the amount claimed to be correct, $——.

(10) Nature of business and how transacted: Importation and sales of ale.

(11) Place, street and number where such business is conducted: 90 Warren St., New York City.

42 (12) Where will mail reach the company? % Olney & Comstock, 68 William St., New York City.

(13) State the city or town, street number and state where this company maintained any store, warehouse, factory or other place of business outside the State of New York: 115 West Grand Ave., Chicago, Ill.; also has principal office at Burton-on-Trent, England, and many other places in different parts of the world.

(14) Any corporation taxable hereunder may omit from this report the segregation of assets on this page only by signing the following consent:

I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income at 4½ per cent or upon its entire capital stock at one mill on the dollar, as provided by law.
For further particulars, see annexed affidavit of Charles H. Taylor.

Do not sign consent unless taxable by the State of New York on entire income or entire issued capital stock.

43 EXHIBIT J-2.

To the State Tax Department, Albany, N. Y.:

STATE OF NEW YORK,
County of New York, ss:

Charles H. Taylor, being duly sworn, deposes and says:

I am the American Manager of Bass, Ratcliff & Gretton, Limited, a British corporation having its principal office at Burton-on-Trent, England, and its American office at No. 90 Warren Street, New York City.

The business of the Company has been to manufacture and sell ales, which are not manufactured in New York State but which are manufactured in Great Britain and imported into this country.

Owing to the Federal laws prohibiting the manufacture, importation or sale of the product of the Company, the Company has no intention of continuing such business in the State of New York for the tax year beginning November 1, 1919, and therefore does not desire a franchise to do business in the State of New York for that year. As a matter of fact, it has not made any sales of its product in the State of New York since on or about the 6th day of November, 1918.

It therefore makes no report to the State Tax Department except as hereto annexed, although it desires to state the facts to the
44 State Tax Department so that it may not be continued upon the tax books of the Department.

(S.) CHARLES H. TAYLOR,
American Manager Bass, Ratcliff & Gretton, Ltd.

Sworn to before me this 5th day of November, 1919.

(S.) G. H. RAYMOND,
[Notarial Seal.] *Notary Public, Kings Co.*, #25.

Certif, filed N. Y. Co. # 64.
N. Y. Reg. No. 10082.
Com. expires March 30/20.

EXHIBIT K.

November 13, 1919.

State Tax Department,
Albany, N. Y.

DEAR SIRS:

We are enclosing an affidavit, accompanying a statement of Charles H. Taylor, the American Manager of Bass, Ratcliff & Gretton, Limited, showing that the Company does not intend to do business

in the State of New York for the tax year beginning November 1, 1919, and therefore does not desire any franchise for that purpose.

Yours respectfully,

(S.) OLNEY & COMSTOCK.

G. C. C./W. V. K.
(Enclosures.)

45 EXHIBIT L.

State Tax Commission.

Walter H. Knapp, President.

John J. Merrill.

M. J. Walsh.

Corporation Tax Bureau.

Newell W. Canfield,

Deputy Commissioner.

State of New York,

Tax Department,

Albany.

December 8, 1919.

A-50746-H.

Bass, Ratcliff & Gretton, Ltd.,
Care of Olney & Comstock,
68 William St., New York City.

GENTLEMEN:

In reference to your letter of November 13th, enclosing partial report and affidavit for the tax year beginning November 1, 1919, under Article 9-A of the tax law, enclosed find proper form of affidavit which may be modified to apply to New York State assets and business and should also indicate the date of the revocation of the certificate of authority of this company to transact business within the State of New York.

Respectfully yours,

STATE TAX DEPARTMENT,

(S.) By N. W. CANFIELD,
Deputy Commissioner.

NWC/D.
30.

46 EXHIBIT M.

December 10, 1919.

Re Bass, Ratcliff & Gretton, Ltd.
File A-50746-H.

State Tax Department.

DEAR SIRS:

Answering yours of December 8th as to Bass, Ratcliff & Gretton, Ltd., do I understand from this letter that, before you will entertain an affidavit showing that a Company no longer intends to do business in this state, you must have evidence before you that the Company has had its certificate of authority to do business in this state revoked?

I am asking this question because, as to this particular Company, it has never applied for any revocation of its certificate of authority and has never had its certificate of authority to do business in this state revoked, although it ceased to do business here November 6, 1918.

Yours respectfully,

(S.) GEO. CARLTON COMSTOCK.

GCC/WVK.

47 EXHIBIT N.

State Tax Commission.

Walter H. Knapp, President.

John J. Merrill.

M. J. Walsh.

Corporation Tax Bureau.

Newell W. Canfield,

Deputy Commissioner.

State of New York,

Tax Department,

Albany.

A-50746-H. December 18, 1919.

Bass, Ratcliff & Gretton, Ltd.,
Care of Olney & Comstock,
68 William Street,
New York City.

GENTLEMEN:

In reply to your letter of December 10th, you are advised:

If the affidavit suggested is filed with this department, no franchise tax will be assessed.

The Secretary of State, however, should be notified of the revocation of the designation within the State, that the record of such office may be completed.

Respectfully yours,

STATE TAX DEPARTMENT,
(S.) By N. W. CANFIELD,
Deputy Commissioner.

NWC/D.

48 EXHIBIT O.

To the State Tax Department,
Albany, N. Y:

In re Bass, Ratcliff & Gretton, Ltd., P. O. Address c/o Olney & Comstock, 68 William St., New York City.

STATE OF NEW YORK,
County of New York, ss:

Charles H. Taylor, being duly sworn, deposes and says:

I reside at No. 615 West 162nd Street, in the Borough of Manhattan, City of New York; I have been the sole American representative and American Manager of Bass, Ratcliff & Gretton, Limited, since the first day of November, 1913.

The said Bass, Ratcliff & Gretton, Limited, is a British corporation, having its principal office at Burton-on-Trent, England. The said corporation ceased business in the State of New York on or about the sixth day of November, 1918, and has notified the Secretary of State accordingly, and it no longer desires permission for a license from the State of New York to transact business therein, but desires that its license heretofore given to it for that purpose be revoked; nor does it contemplate resuming operations in New York State.

Deponent further states that this is made for the purpose of having the name of the coroporation eliminated from the list of those required to file annual returns under Section 9*a* of the Tax Law or otherwise, and that he realizes that the obligations to secure blanks and make return is assumed by the corporation in event operations are resumed in New York State.

49

(S.) CHARLES H. TAYLOR,
American Manager Bass, Ratcliff & Gretton, Ltd.

Subscribed and sworn to this 23 day of December, 1919.
(S.) G. H. RAYMOND,
[Notarial Seal.] *Notary Public, Kings Co., No.* 26.

Certificate filed New York Co. No. 64.
New York Register's No. 10062.
Commission expires March 30, 1920.

EXHIBIT P.

December 24, 1919.

Re Bass, Ratcliff & Gretton, Ltd.

State Tax Department.

DEAR SIRS:

In answer to your letter of December 8th, we beg to enclose a copy of letter this day written and sent to the Secretary of State by Bass, Ratcliff & Gretton, Ltd., and also a further affidavit by Mr. Taylor, the American Manager of Bass, Ratcliff & Gretton, which follows, as closely as the facts permit, the form of affidavit which you forwarded to us.

Yours respectfully,

(S.) OLNEY & COMSTOCK.

GCC/WVK.
(Enclosures.)

50 EXHIBIT Q.

December 24, 1919.

Re Bass, Ratcliff & Gretton, Limited.

Secretary of State of New York.

DEAR SIR:

Bass, Ratcliff & Gretton, Ltd., a British corporation, having its principal office at Burton-on-Trent, England, and its American office at No. 90 Warren Street, New York City, and whose business it is and has been to manufacture and sell ales which are not manufactured in New York State, but which are manufactured in Great Britain and imported into this country, has not transacted business in New York State since November 6, 1918, and does not intend to resume business in this State.

It was licensed to do business in this state by a license issued by you to it on the 3rd day of February, 1898.

It now asks you to revoke such license.

Yours respectfully,

BASS, RATCLIFF & GRETTON,
For CHARLES H. TAYLOR,
American Manager.

51 EXHIBIT R.

State Tax Department. May 21, 1920.

DEAR SIRS:

On the hearing for revision held May 19th, of Bass, Ratcliff & Gretton, Ltd., the question was asked what the local assessments were on this corporation. The answer is that there was no local assessment.

Yours very truly,

(S.) OLNEY & COMSTOCK.

GCC/WVK.

EXHIBIT S.

State of New York,

Tax Department.

Corporation Tax Bureau.

Albany, July 28, 1920.

In the Matter of the Application of BASS, RATCLIFF & GRETTON, LTD., for a Revision of Taxes Assessed Against It under Article IX-A of the Tax Law, Section 214.

An application having been made by the above-named Bass, Ratcliff & Gretton, Ltd., for a revision and resettlement of
52 the taxes assessed and determined against it by the State Tax Department, based on business for the one year ending June 30, 1918, and the said State Tax Department having heard the proofs offered on behalf of the said Bass, Ratcliff & Gretton Ltd. in support of said application, does hereby determine after due consideration thereof that the assessment heretofore made against the said Bass, Ratcliff & Gretton, Ltd. for the sum of Eight hundred twenty-six and 14/100 dollars, should be affirmed; which said sum of Eight hundred twenty-six & 14/100 dollars is hereby determined as the amount which said Bass, Ratcliff & Gretton, Ltd. is liable to pay under the provisions of Section 214 of the Tax Law, based on business for the one year ending June 30, 1918.

(S.) N. W. CANFIELD,
Deputy Tax Commissioner.

Countersigned:

(S.) JOHN J. MERRILL,
(S.) JAMES D. SMITH,
Tax Commissioners.

53 EXHIBIT T.

State Tax Commission.

M. J. Walsh, President.

John J. Merrill.

James D. Smith.

Corporation Tax Bureau.

Newell W. Canfield,

Deputy Commissioner.

State of New York,

Tax Department,

Albany.

July 28, 1920.

A-79773-H.

Bass, Ratcliff & Gretton, Ltd.,
Care of Olney & Comstock,
68 William Street,
New York City.

GENTLEMEN:

Enclosed find determination in reference to franchise tax assessed against this corporation under Article 9-A of the tax law for the year beginning November 1, 1918.

Respectfully yours,

STATE TAX DEPARTMENT,

(S.) By N. W. CANFIELD,
Deputy Commissioner.

C.
N. W. C./D.
Det.

54 RETURN TO WRIT.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED,

against

STATE TAX COMMISSION, Respondent.

The State Tax Commission of the State of New York, composed of State Tax Commissioners Michael J. Walsh, John J. Merrill and James D. Smith, obedient to the command of the writ of certiorari

herein issued out of this court on the 30th day of August, 1920, a copy of which is hereto attached,

Hereby certifies and returns to this court the accounts and all the evidence taken before it on the application of Bass, Ratcliff & Gretton, Limited, for a revision and resettlement of its account for its annual franchise tax under Article 9-A of the Tax Law for the tax year beginning November 1, 1918, and all the papers and proofs upon the original statement of said account and all proceedings thereon, documents, reports and records submitted to or considered by it, together with its action in the premises, to wit:

Exhibit "A."—Formal report of the relator corporation, made to the State Tax Department, indicating that the relator's net income for the fiscal year ending June 30, 1918, was nothing.

55 Exhibit "B."—Letter dated February 7, 1919, from the State Tax Department, addressed to the relator corporation, enclosing additional blank and calling for an amended report.

Exhibit "C."—Amended report of Bass, Ratcliff & Gretton, Limited, for the tax year in question showing the company's entire net income in the amount of $2,185,600 and revising the figures calling for its total and New York State assets.

Exhibit "D."—Formal protest of the relator corporation against the making of a further return and claiming that any tax assessed against the corporation would be unconstitutional on various grounds.

Exhibit "E."—Letter of Olney & Comstock attorneys for the relator corporation, dated September 5, 1919, addressed to the State Tax Department, enclosing the aforementioned report.

Exhibit "F."—Formal protest, dated September 26, 1919, by the relator corporation protesting against the payment of the tax stated against it by the State Tax Commission on September 25, 1919, and applying for a revision and cancellation of the said tax.

Exhibit "G."—Letter dated September 26, 1919, accompanying the above-mentioned petition for a revision of the tax, addressed to the State Tax Commission, by Olney & Comstock, attorneys for the relator corporation.

Exhibit "H."—Notice dated October 11, 1919, by the State Tax Commission to the relator, advising that a hearing will be granted in the matter of the cancellation of the tax.

Exhibit "I."—Letter from the relator corporation, addressed to the State Tax Department and the State Comptroller, dated October 18, 1919, enclosing check in the amount of $826.14 in payment
56 of the tax assessed against it by the Commission.

Exhibit "J."—Affidavit of Charles H. Taylor, American Manager of the relator corporation, sworn to on the 5th day of November, 1919, stating that the corporation does not desire to do business in the State of New York.

Exhibit "K."—Letter of Olney & Comstock, attorneys for the relator, accompanying the aforementioned affidavit of Charles H. Taylor.

Exhibit "L."—Letter to the relator corporation, dated December 8, 1919, from the State Tax Department, referring to the form of affidavit furnished by the relator.

Exhibit "M."—Letter of George Carlton Comstock, dated December 10, 1919, addressed to the State Tax Department, indicating that the relator had never applied for any revocation of its certificate of authority to do business in the State of New York.

Exhibit "N."—Letter from the State Tax Department dated December 18, 1919, addressed to the relator corporation, concerning the affidavit furnished by it and concerning the revocation of its certificate of authority to do business in this State.

Exhibit "O."—Additional affidavit of Charles H. Taylor, American Manager of the relator, sworn to on the 23rd day of December, 1919, made for the purpose of having the corporation eliminated from the list of those required to file annual returns under Article 9-A of the Tax Law.

Exhibit "P."—Letter from Olney & Comstock, addressed to the State Tax Department, and dated December 24, 1919, enclosing a copy of a letter written the Secretary of State and the affidavit of its manager hereinbefore mentioned.

Exhibit "Q."—Letter from the relator corporation, dated
57 December 24, 1919, addressed to the Secretary of State, indicating that the corporation does not intend to resume business in this State.

Exhibit "R."—Communication dated May 21, 1920, from Messrs. Olney & Comstock, attorneys for the relator, to the State Tax Department, showing that no local assessments were made against the corporation.

Exhibit "S."—Transcript of proceedings and testimony had and taken at the office of the State Tax Commission, Albany, N. Y., on the 18th day of May, 1920, in the matter of the revision and resettlement of its annual franchise tax.

Exhibit "T."—Final determination of the State Tax Commission, dated June 30, 1918, stating the tax against the corporation in the sum of $826.14 and refusing to revise or readjust the same.

The State Tax Commission further denies each and every allegation in the petition for a writ of certiorari or contained in the writ herein, except in so far as the same are shown to be true by this return, and the State Tax Commission alleges that the tax imposed upon Bass, Ratcliff & Gretton, Limited, was justly and legally imposed upon it under the tax laws of this State.

In witness whereof, the State Tax Commission has hereunto set its hand and seal this 9th day of October, 1920.

[SEAL.] STATE TAX COMMISSION,
By M. J. WALSH, *President*.

58 EXHIBIT S.

State of New York,

Tax Department.

In the Matter of the Application of BASS, RATCLIFF & GRETTON, LTD., for a Revision and Readjustment of Franchise Tax Assessed against it under Article 9-*a* of the Tax Law for the Tax Year Beginning November 1, 1918, Based on Report of Its Business for the Year Ending June 30, 1918.

Hearing held at the office of the State Tax Department, Albany, N. Y., on the 18th day of May, 1920, at 2 P. M.

Appearances:

George C. Comstock appeared for the petitioner, Bass, Ratcliff & Gretton, Ltd.

Hon. John J. Merrill, State Tax Commissioner, with N. W. Canfield, Deputy Commissioner, appeared for the State of New York Tax Department.

Mr. Comstock: The report of the company shows that it is a British corporation, with a branch in the United States at 90 Warren Street, New York City; that its net income for the fiscal year
59 ending June 30, 1918, which is the one in question, reported to the United States Treasury Department was nothing; that its entire net income wherever earned for that year was $2,185,600, and then its report without the State, the exact figures show a comparatively small proportion of its assets in this country as compared to its assets everywhere. Upon its report to the State Tax Department, the Department taxed it not upon that proportion of its capital stock employed in this country at the minimum rate, but upon that portion of its net income proportioned as its assets in New York State were to its assets everywhere. We find no fault with the arithmetical figures of the State of New York Tax Department; the only fault we find with the assessment is the method of computation. We think, there being no net income reported to the United States Treasury Department, the tax should be assessed at the minimum rate on that portion of its capital stock employed in the State of New York.

CHARLES H. TAYLOR, being duly sworn, testified:

By Mr. Merrill:

Q. What is your connection with this company?
A. American manager.

Q. Where did you obtain the figures that you presented in this report?

A. From the Board of Directors' report from the home office.

Q. How did you know the amount of property you had on hand in New York?

A. We make a report annually.

Q. So that the amount of your inventory indicated your property there?

60 A. It shows the average monthly value of the property; we reported the stock on hand for a certain period each year, June 30.

Q. Do you know what that indicated; do you know what your report indicated for that period?

A. That would just show what was left after being sold for the year.

Q. What do the figures, $23,668.33, what does that represent?

A. The average amount of stock we held during the year, and so forth.

Q. What do you mean by "and so forth"?

A. The only property we had was goods for sale.

Q. That was merchandise; didn't you have any office furniture, fixtures, etc.?

A. Yes, a very small lot.

Q. What was the value of them?

A. About $950.

Q. What did that consist of?

A. Desks, typewriter, chairs, safe, rugs, everything was quite old.

Q. That was about the amount you are carrying it at?

A. Yes, we have recently sold it off, April 30 for $945.03 I think it was altogether.

Q. On how long a time did you sell goods?

A. That was all ale principally; we did not handle any bottles, this was on draft.

Q. What do those figures represent, where were they taken from?

A. On the selling price.

Q. On how long a time did you sell those goods generally?

A. Thirty days' time.

Q. So your bills and accounts receivable would run on an average about thirty days?

A. Yes.

Q. The company was organized under the laws of Great Britain?

A. Yes.

Q. How long a time have you been doing business in New York?

A. Since 1897.

Q. Do you know what your total sales were during that year in New York, in this country, approximately?

A. $258,000.

61 Q. How much of that was in New York approximately, the bulk of it wasn't it?

A. Yes; we had some in Chicago, the bulk we had in New York.

Q. The Chicago business was not to exceed 7%, was it, all of your outside business in this country was not over 7%, was it?

A. No, I don't believe it would run over that.

Q. Your sales from the New York stock was about $240,000 for that year?

A. I would say yes.

Q. In other words, you take your total sales in New York and divide by twelve and you get approximately the amount you return here as your bills and accounts receivable for New York?

A. Yes.

Q. As I understand from your statement, your gross sales were about $258,000?

A. Yes.

Q. That gives cost to you without consideration of expense of $256,600?

A. Yes.

Q. Your expenses were $68,000?

A. Yes.

Q. What were these commissions allowed for?

A. Agents in various cities, Philadelphia and places where we had no agencies of our own.

Q. Were they paid a commission directly on sales or what?

A. Yes, directly on sales. On the amount of sales we have in their particular city.

Q. None of it paid to the New York branch?

A. Salesmen were on direct salary in New York City branch.

Q. They had no other remuneration except a direct salary?

A. No.

Q. We are to conclude from your statement and this report that the company had tangible personal property in the City of New York of between $23,000 and $24,000, including furniture and fixtures?

A. Yes.

Q. And the merchandise stock on hand?

A. Yes.

Q. And bills and accounts receivable of about $20,450?

A. Yes.

62 Q. Do you know whether this company had been taxable locally prior to 1918 on personal property?

A. I do not think so; I do not recall that they were.

Mr. Merrill: You can find out and put it in here as an exhibit.

Q. Your company was continuously in business from March, 1897, to April of this year in New York?

A. We ceased importing; the last sale was made in November, 1918; the United States government prohibited any importations April 15, 1918.

Q. You disposed of the balance of your property down there in April of this year?

A. Yes, we closed the office.

Q. That was your furniture?

A. Yes, we had no stock; the last stock sold was sold in November, 1918.

The exhibits to the return are identical with the exhibits to the petition printed herein, except that Exhibit S to the return (printed above) was not an exhibit to the petition and Exhibit T to the return is the same as Exhibit S to the petition and Exhibit T to the petition is not an exhibit to the return.

63 *Affidavit of No Opinion.*

STATE OF NEW YORK,
County of New York, ss:

Geo. Carlton Comstock, being duly sworn, deposes and says that he is a member of the firm of Olney & Comstock, attorneys for the relator in this proceeding; that no opinion was rendered by the Justice of Special Term upon the granting of the order allowing the writ of certiorari.

GEO. CARLTON COMSTOCK.

Sworn to before me this 21st day of October, 1920.

F. T. SARGENT,
Notary Public, No. 671, New York County.

64 *Waiver of Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing printed papers contain true and correct copies of the writ of certiorari, order allowing same, petition, exhibits and return to writ, and the whole thereof, now on file in the office of the Clerk of Albany County, and certification thereof is hereby waived.

Dated, New York, November 1, 1920.

OLNEY & COMSTOCK,
Attorneys for Relator.

68 William Street, New York City.

CHARLES D. NEWTON,
Attorney-General,
Attorney for Respondents, Capitol, Albany, N. Y.

65 *Order of Appellate Division Appealed From.*

At a Term of the Appellate Division of the Supreme Court Held in and for the Third Judicial Department, at the County Court House, in the City of Albany, Commencing on the 3rd Day of May, 1921.

Present:

Hon. John M. Kellogg,
Presiding Justice.
Hon. John Woodward,
" Aaron V. S. Cochrane,
" Michael H. Kiley,
" Charles C. Van Kirk,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

The relator above named having heretofore duly obtained an order granting a writ of certiorari to review the determination of the State Tax Commission in refusing to revise and readjust the relator's annual franchise tax for the tax year beginning November 1, 1918, and a return having been duly filed to said writ of certiorari by the respondent, State Tax Commission, and said pro-
66 ceeding having come on for argument before this court, and Messrs. Olney & Comstock, by Mr. Robert C. Beatty, having been heard on behalf of the relator, the respondent appearing by the Attorney General, Charles D. Newton, and due deliberation having been had,

Now, on motion of Charles D. Newton, Attorney General of the State of New York and attorney for the State Tax Commission, it is

Ordered, that the determination of the State Tax Commission herein, made on the 28th day of July, 1920, be and the same hereby is unanimously affirmed with Fifty Dollars ($50.00) costs and disbursements.

JOSEPH H. HOLLANDS,
Clerk.

A Copy.

JOSEPH H. HOLLANDS,
Clerk.

67 *Notice of Appeal to Court of Appeals.*

Supreme Court of the State of New York, County of Albany.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LTD., Relator,

against

STATE TAX COMMISSION, Respondent.

SIRS:

Please take notice that the Relator in the above entitled proceeding hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court for the Third Judicial Department, entered in the office of the Clerk of the County of Albany on or about the 7th day of September, 1921, affirming the determination of the State Tax Commission herein, and the said Relator appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, September 13, 1921.

Yours, etc.,

OLNEY & COMSTOCK,
Attorneys for Relator.

Office & P. O. Address,
No. 68 William Street,
Borough of Manhattan,
City of New York.

68 To:
Luther C. Warner, Esq.,
Clerk County of Albany.
Hon. Chas. D. Newton,
Attorney General,
Attorney for Respondent.

Undertaking.

Supreme Court of the State of New York, County of Albany.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LTD., Relator,

against

STATE TAX COMMISSION, Respondent.

Whereas, the above named People of the State of New York on the relation of Bass, Ratcliff & Gretton, Ltd., Relator and appellant, has appealed or intends to appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court for the
69 Third Judicial Department, entered in the office of the Clerk of the County of Albany on or about the 7th day of September,

1921, affirming the determination of the State Tax Commission herein, and appeals from each and every part of said order, as well as from the whole thereof.

Now, Therefore, the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, does hereby, pursuant to the statute in such cases made and provided, undertake that the appellant, People of the State of New York on the relation of Bass, Ratcliff & Gretton, Ltd., will pay all costs and damages which may be awarded against the appellant, People of the State of New York on the relation of Bass, Ratcliff & Gretton, Ltd., on said appeal, not exceeding Five Hundred ($500.00) Dollars.

Dated, New York, September 13th, 1921.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-Fact.

Attest:
WILLIAM H. ESTWICK, *Attorney-in-Fact.*

STATE OF NEW YORK,
County of New York, ss:

On the 13th day of September, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is Attorney-in-fact of the United States Fidelity and
70 Guaranty Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he was acquainted with William H. Estwick and knew him to be the Attorney-in-fact of said Company; that the signature of said William H. Estwick, subscribed to the within instrument, is in the genuine handwriting of said William H. Estwick, was subscribed thereto by like order of said Board of Directors, and in the presence of him the said S. Frank Hedges.

JAMES A. STARR,
Commissioner of Deeds for the City of New York.

Term expires November 11, 1921.

Certificates filed in Richmond County and the following Counties:
County Clerks' Nos.: N. Y. 411, Kings 300, Queens 3946, Bronx
51.
Registers' Nos.: New York 21191, Kings 1137, Bronx 21055.

71 STATE OF NEW YORK,
County of New York, ss:

I, S. Frank Hedges, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 13th day of September, 1921.

S. FRANK HEDGES,
Attorney-in-Fact.

Affidavit of No Opinion.

STATE OF NEW YORK,
County of New York, ss:

Robert C. Beatty, being duly sworn, says that he is associated with Olney & Comstock, attorneys for the relator in this proceeding, and argued the same in the Appellate Division, Third Department. That Court did not render any opinion in determining this certiorari proceeding by affirming the determination of the State Tax Commission.

ROBERT C. BEATTY.

Sworn to before me this 13th day of September, 1921.

CHARLES T. LESTER,
Notary Public, New York County.

New York County Clerk's No. 347.
New York County Register's No. 3298.
Commission Expires March 30th, 1923.

72 *Waiver of Certification.*

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the order of affirmance of the Appellate Division, Third Department, appealed from, the notice of appeal to the Court of Appeals, the undertaking on appeal to the Court of Appeals, affidavit of no opinion, and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Albany, and certification thereof, in pursuance of Sections 1353 and 3301 of the Code of Civil Procedure, is hereby waived.

Dated, New York, September 15th, 1921.

OLNEY & COMSTOCK,
Attorneys for Relator-Appellant.
CHARLES D. NEWTON,
Attorney General, Attorney for Respondent.

73 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of The People of the State of New York ex rel. Bass, Ratcliff & Gretton, Limited, Appellant v. State Tax Commission, Respondent, decided by the Court of Appeals on the eighteenth day of October 1921, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this seventh day of December, 1921.

[Seal of Court of Appeals.]

(S.) J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK:

Court of Appeals.

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appelate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports
74 thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of The People of the State of New York ex rel. Bass, Ratcliff & Gretton, Limited, Appellant, v. State Tax Commission, Respondent, decided by the said Court of Appeals on the eighteenth day of October, 1921, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the eighth day of December in the year one thousand nine hundred and twenty-one.

(S.) FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals of the State of New York.

75 Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. BASS, RATCLIFF & GRETTON, LIMITED, Appellant,

against

STATE TAX COMMISSION, Respondent.

(Decided October 18, 1921.)

Appeal from Order of Appellate Division, Third Department, Affirming, in Certiorari Proceedings, a Determination of the State Tax Commissioners in Assessing a Franchise Tax.

Robert C. Beatty for appellant.
Charles D. Newton, Attorney-General (C. T. Dawes of counsel), for respondent.

POUND, *J.:*

Relator is a foreign manufacturing corporation organized under the laws of Great Britain and authorized to do business in the state of New York. For the privilege of doing business in this state it must annually pay in advance for the year beginning November first next preceding an annual franchise tax to be computed by the tax commission upon the basis of its net income for the year preceding. (Tax Law (Cons. Laws, ch. 60), Sec. 209.) Its business in New York was the importation and sale of Bass ale manufactured at Burton-on-the-Trent. The question is as to the amount of the annual franchise tax for the year beginning November 1, 1918. It had in the year 1918 total segregated assets wherever located $3,212,405; actual value of shares of stocks of other corporations $845,195, a total of $4,057,600. Limiting the value of such shares to ten per centum of the aggregate real and tangible personal property (Tax Law, Par. 214, Sub. 6) the Commission found total assets of $3,501,483; assets in New York $44,117. Its total net income for the year was $2,185,600. Its total sales in New York
76 for the year amounted to about $240,000. Its net income from the New York business was nothing. The state tax commission under section 215 of the Tax Law providing for the computation of the tax by a comparison of total assets with assets in New York, allocated as taxable income to the state of New York the sum of $27,537.68, and computed a tax thereon at the rate of

three per cent, amounting to $826.14. This tax was in lieu of all other taxes on personal property, capital stock or income. (Tax Law, Sec. 219-*j*; Sec. 350, subd. 7.) The method of computation is stated in detail in the recent case of People ex rel. Alpha P. C. Co. v. Knapp (230 N. Y. 48).

The sole question considered on this appeal is the constitutionality of the operation of the Tax Law which makes as the basis of relator's taxable net income in New York a portion of its net income earned wholly outside the state.

The tax is denominated a franchise tax and although we have said in another connection (People ex rel. Alpha P. C. Co. v. Knapp, supra, p. 57) that "the tax imposed upon this franchise must be held in practical operation to be a tax upon the income. This tax is equivalent to a tax upon relator's income," it is primarily a tax levied for the privilege of doing business in the state. Relator's business, although unprofitable in the year 1918, was extensive in its nature.

When in the practical workings of the statute by virtue of circumstances, a year's business produces no net income, is so much of the statute as provides for a comparison of the total assets with
77 the assets in the state of New York as a basis for the computation of the sum on which the tax is to be computed basically a tax on property outside the state because the income out of which this tax is paid for this year by this corporation is property outside the state of New York and as such beyond the jurisdiction of the state?

We think the question should be answered in the negative. Such a method of levying a franchise tax is not inherently arbitrary. It is based on a comparison of the total assets with the assets in New York. Nor has its application to this corporation produced an unreasonable result in the moderate sum assessed in lieu of all other taxes on its personal property, capital stock or income. It would on the contrary seem unreasonable thus to exempt relator from taxation on its large though unprofitable business in this state. (Underwood Typewriter Co. v Chamberlain, 254 U. S. 113.) The statute attaches a value to the privilege of doing business in this state based not on the net income produced in this state merely but on the proportion of its capital employed here. Generally speaking, such a franchise tax is not unfair. Like other tax laws, it may in individual cases work hardship and inequality, not because the mode of measurement necessarily attaches a value to and imposes a tax upon tangible property beyond the jurisdiction of the state and thereby arbitrarily and unreasonably increases the local burden by a resort to foreign assets as in the Alpha Case (supra) but because the fortunes of trade and business fluctuate with changing laws and customs and at times throw the burden of the tax upon the going concern as a whole and not on the local branch.

The order appealed from should be affirmed, with costs.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and
78 Andrews, JJ., concur.

Order affirmed.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Court, being Courts of Record held therein, do hereby certify that I have compared the annexed copy opinion with the original thereof filed in this office on the 11 day of Jan., 1922, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan., 1922.

[Seal Albany County, July, 1847.]

L. C. WARNER,
Clerk.

79 [Endorsed:] Court of Appeals, State of New York. The People of the State of New York ex rel. Bass, Ratcliff & Gretton, Limited, Appellant, against State Tax Commission, respondent. Opinion. Office of Albany County Clerk. 1922, Jan. 11, P. M. 3:31. Albany, N. Y.

80 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of October in the Year of Our Lord one thousand nine hundred and twenty-one, before the Justices of said Court.

Witness the Hon. Frank H. Hiscock, Chief Judge Presiding.

R. M. BARBER,
Clerk.

Remittitur. October 19, 1921.

THE PEOPLE, &c., ex Rel. BASS, RATCLIFF & GRETTON, LTD., Applt.,

ag'st

STATE TAX COMMISSION, Respt.

Be it remembered, that on the 16th day of September in the year of our Lord One thousand nine hundred and twenty-one Bass, Ratcliff & Gretton, Ltd., appellant in this cause, came here into the Court of Appeals, by Olney & Comstock, its attorneys, and filed in said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And said State Tax Commission, the respondent in said cause, afterward appeared in said Court of Appeals by Charles D. Newton, Attorney General.

81 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Robert C. Beatty, of counsel for the appellant, and by Mr. C. T. Dawes, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, be it given in the premises, are by said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

82 Court of Appeals, Clerk's Office.

Albany, Oct. 19th, 1921.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER,
Clerk.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Remittitur with the original thereof filed in this office on the 26 day of Nov., 1921, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan., 1922.

[Seal Albany County, July, 1847.]

L. C. WARNER,
Clerk.

83 At a Special Term of the Supreme Court of the State of New York Held in and for the County of Albany, at the Court House, in the City of Albany, on the 26th Day of November, 1921.

Present: Hon. Harold J. Hinman, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

The relator above named having heretofore duly obtained an order granting a Writ of Certiorari to review the determination of the State Tax Commission in assessing a tax against the said relator under Article 9A of the Tax Law for the taxable year 1918, and a return having been filed to the said Writ by the State Tax Commission and said proceedings having come on for argument at a Term of the Appellate Division, Third Department, commencing on the 3rd day of May 1921, and the said Appellate Division by an order entered in the office of the Clerk of the County of Albany on the 7th day of July 1921, having confirmed the determination of the State Tax Commission against the relator with $50.00 costs and disbursements, and the relator having thereafter appealed to the Court of Appeals of the State of New York from said order and the Court of Appeals having sent hither its remittitur under date of October 19, 1921, by which it appears that the Court of Appeals has affirmed the said order of the Appellate Division with costs and has remitted its judgment to this Court to be enforced according to law.

Now, on reading and filing the remittitur of the Court of
84 Appeals herein, and on motion of Charles D. Newton, Attorney-General, Attorney for the State Tax Commission, it is

Ordered, That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court and the determination of the State Tax Commission dated July 28, 1920, is hereby in all respects confirmed, and that judgment be entered to the above effect with costs and disbursements to be taxed against the relator.

HAROLD J. HINMAN.
Jus. Sup. Ct.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Order on Remittitur with the original thereof filed in this office on the 26 day of Nov. 1921, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan. 1922.

[Seal of Albany County.]

L. C. WARNER,
Clerk.

85 SIR:

Take notice that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County, on the 26th day of November 1921.

Yours, etc.,

CHARLES D. NEWTON,
Attorney-General.

To Attorney for —— ——.
Nov. 26-21.

[Endorsed:] Supreme Court, Albany County. The People of the State of New York ex rel. Bass, Ratcliff & Gretton, Limited, Relator, against State Tax Commission, Respondent. Copy. Order on Remittitur of the Court of Appeals. Charles D. Newton, Attorney-General, Attorney for Respt. Capitol, Albany, N. Y.

86 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Relator,

against

STATE TAX COMMISSION, Respondent.

The relator, above named, having heretofore obtained an order granting a Writ of Certiorari to review the determination of the State Tax Commission in assessing a tax against the said relator under Article 9A of the Tax Law, for the taxable year 1918, and a return having been filed to the said Writ by the said State Tax Commission and said proceeding having come on for argument at a Term of the Appellate Division, Third Department, commencing on the 3rd day of May, 1921, and the said Appellate Division by an order entered in the office of the Clerk of the County of Albany on the 7th day of July, 1921, having confirmed the determination of the State Tax Commission against the relator with $50.00 costs and disbursements, and the relator thereafter having appealed to the Court of Appeals of the State of New York from said order, and the Court of Appeals having sent hither its remittitur under date of October 19, 1921, by which it appears that the Court of Appeals has affirmed the said order of the Appellate Division, with costs, and has remitted its judgment to this Court to be enforced according to law, and this Court by an order duly entered herein having ordered that the said judgment and order of the Court of Appeals be made the order and judgment of this court, and the costs of the respondent,

State Tax Commission, in the Appellate Division and in the Court of Appeals having been duly taxed at the sum of $191.25, as per Bill of Costs filed with the Clerk of this Court on this date.

Now, on motion of Charles D. Newton, Attorney-General,
87 Attorney for the respondent, the State Tax Commission, it is

Adjudged, That the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court, and it is further

Adjudged, That the State Tax Commission recover from the relator costs in the Appellate Division and in the Court of Appeals, as per Bill of Costs filed herein in the sum of $191.25.

L. C. WARNER,
Clerk.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Judgment on Remittitur with the original thereof filed in this office on the 26 day of Nov. 1921 and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan. 1922.

[Seal of Albany County.]

L. C. WARNER,
Clerk.

88 SIR:

Take notice that the within is a copy of a Judgment duly filed and entered in the office of the Clerk of Albany County, on the 26th day of November, 1921.

Yours, etc.,

CHARLES T. NEWTON,
Attorney-General.

To Attorney for —— ——.

[Endorsed:] Supreme Court, Albany County. The People of the State of New York, ex rel. Bass, Ratcliff & Gretton, Limited, Relator, against State Tax Commission Respondent. Copy. Judgment on Remittitur of Court of Appeals. Charles D. Newton, Attorney-General, Attorney for Respt., Capitol, Albany, N. Y.

89 Court of Appeals, State of New York.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error,

against

STATE TAX COMMISSION, Defendant-in-Error.

Petition for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Justice of the Court of Appeals of the State of New York:

The petition of Bass, Ratcliff & Gretton, Limited, respectfully shows:

First. That, on or about the 18th day of October, 1921, the Court of Appeals of the State of New York made and entered a final order and judgment herein, affirming the final order of the Appellate Division of the State of New York, Third Department, which order of the Appellate Division confirmed the determination of the State Tax Commission of the State of New York against the plaintiff-in-error, and which final order of the Appellate Division was entered in the office of the Clerk of the County of Albany on the 7th day of September, 1921. Thereafter, on or about the 26th day of November, 1921, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for the County of Albany, the said final order and judgment of the Court of Appeals were made and entered as the final judgment of the said Supreme Court.

90 Second. The said Court of Appeals of the State of New York is the highest court of the State of New York in which a decision could be had in said cause.

Third. By the said final order and judgment entered in the said Supreme Court of the State of New York and the proceedings had prior thereto in this cause, your petitioner has been denied the guaranty and protection provided for by the Constitution of the United States, and a right, privilege, or immunity especially set up and claimed by your petitioner under the said Constitution has been denied and the validity of an act of the legislature of the State of New York in imposing a tax upon the plaintiff's property, which was drawn in question on the ground of its being repugnant to the Constitution of the United States was upheld, all of which has been made to appear on the record of the said cause, as will more fully appear by an inspection of the said record and of the assignment of errors filed with this petition, and from the brief submitted on behalf of the petitioner to the said Appellate Division and Court of Appeals.

Fourth. A copy of the said printed record and copies of briefs submitted by your petitioner to the said Appellate Division and the Court of Appeals are submitted herewith. The federal questions

above referred to appear in all of the said briefs, and the petition for a writ of certiorari expressly alleges:

"Your petitioner further shows and alleges that the assessment of the said tax and determination by the said State Tax Commission, as hereinabove set forth, is erroneous and inequitable, for the reasons that the law under which said tax is assessed is in violation of the Constitution of the United States and the Constitution of the State of New York, and in that, among other things, it deprives the
91 persons so taxed of their property without due process of law and without just compensation; that it denies to said persons the equal protection of the laws and attempts illegally to impose a tax upon a tax imposed and assessed by the Government of the United States, and imposes an unequal tax and illegally discriminates against certain of the persons so taxed and in favor of certain other persons so taxed; and upon the further ground that, inasmuch as your petitioner is a foreign corporation organized under the laws of England, that the said tax is in violation of the comity of nations; that the assessment and determination of the State Tax Commission fails to give consideration to the business and property of the corporation not employed in the United States or the State of New York, and upon the further ground that the said assessment and determination and the said tax is computed upon a part of the income of your petitioner represented by its earnings made outside of the United States of America and is, therefore, in contravention of the directions and provisions of the Act in question in that the said tax and assessment and determination are not based upon the amount of income reported to the Federal Government of the United States under the Income Tax Law of the United States, and are not computed upon the basis of your petitioner's net income, upon which income your petitioner was required to pay a tax to the United States."

Wherefore your petitioner prays that a writ of error may issue in the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and the reversal of the final judgment so complained of, that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to the Supreme Court of the United States, and that your petitioner may have such other and further relief in the prem-
92 ises as may be just.

Dated, New York, December 14th, 1921.

BASS, RATCLIFF & GRETTON, LIMITED,
By CHARLES H. TAYLOR,
Agent and Attorney in Fact.

OLNEY & COMSTOCK,
Attorneys for the Petitioner.

68 William Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Petition with the original thereof filed in this office on the 11 day of Jan. 1922, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan., 1922.

[Seal of Albany County.]

L. C. WARNER, *Clerk.*

93 STATE OF NEW YORK,
County of New York, ss:

Charles H. Taylor, being duly sworn, deposes and says that he is the Agent and Attorney in Fact of Bass, Ratcliff & Gretton, Limited, the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

This verification is made by deponent and not by Bass, Ratcliff & Gretton, Limited, for the reason that Bass, Ratcliff & Gretton, Limited, is a foreign corporation, of which deponent is an officer, to wit, its Agent and Attorney in Fact; that all the material allegations of the petition are within the knowledge of the deponent, having kept informed of all charges and attempted charges for taxes and assessments on the property of the petitioner.

CHARLES H. TAYLOR.

Sworn to before me this 14th day of December, 1921.
[SEAL.] MADGE HARTUNG,
Notary Public, Kings County, No. 405.

Kings County Register No. 9165.
Certificate filed New York County No. 459,
New York Register No. 3351.

94 [Endorsed:] Court of Appeals, State of New York. People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, Plaintiff-in-Error, against State Tax Commission, Defendant-in-Error. Petition for Writ of Error. Olney & Comstock, Attorneys for Plaintiff-in-Error, No. 68 William Street, New York, N. Y. Office of Albany County Clerk, 1922, Jan. 11, P. M., 3.30. Albany, N. Y. Jan. 11, '22.

Read on application Dec. 23, 1921. F. H. H.,
Chf. Judge.

95 Court of Appeals, State of New York.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error,

against

STATE TAX COMMISSION, Defendant-in-Error.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard on the petition of Bass, Ratcliff & Gretton, Limited, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York in and for the County of Albany, and upon the examination of said petition and the record of said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter, and a bond having been furnished by the plaintiff-in-error conditioned according to law, in the sum of five hundred ($500) dollars;

Now therefore, it is ordered that a writ of error be, and the same hereby is, allowed to the Supreme Court of the State of New York in and for the County of Albany, and that a true copy of the record, assignment of errors, and all proceedings in this cause be transmitted to the Supreme Court of the United States duly certified according to law, in order that said Court may inspect the same and take such action thereon as it deems proper according to the law.

Dated, Albany, N. Y., December 23, 1921.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

96 [Endorsed:] Court of Appeals, State of New York. People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Ltd., Plaintiff-in-Error, against State Tax Commission, Defendant-in-Error. Order of Allowance of Writ of Error. Olney & Comstock, Attorneys for Plaintiff-in-Error. No. 68 William Street, New York, N. Y. Office of Albany County Clerk, 1922, Jan. 11, P. M. 3.26. Albany, N. Y. Jan. 11-22.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the final judgment or order, which is in the said Supreme Court of the State of New York, in and for the County of Albany, upon a remittitur from the Court of Appeals, the same being the highest court of law or equity of said state in which a decision could be had in the said suit between People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, plaintiff-in-error, and

State Tax Commission, defendant-in-error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said state on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution of the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under said constitution, a manifest error hath happened to the great damage of the said Bass, Ratcliff & Gretton, Limited, as by its petition appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
98 the same to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 27th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the United States District Court, N. Dist. of New York.]

C. W. HIGGISON,
Clerk of the District Court of the United States for the Northern District of New York.

Allowed by:

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

99 [Endorsed:] Supreme Court of the United States. People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Ltd., Plaintiff-in-Error, against State Tax Commission, Defendant-in-Error. Writ of Error. Olney & Comstock, Attorneys for Plaintiff-in-Error. No. 68 William Street, New York. N. Y. Office of Albany County Clerk, 1922, Jan. 11, P. M. 3.26. Albany, N. Y. Jan. 11-22.

100 Court of Appeals, State of New York.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiffs-in-Error.

against

STATE TAX COMMISSION, Defendant-in-Error.

Know all men by these presents:

That we, Bass, Ratcliff & Gretton, Limited, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, having an office and usual place of business at No. 75 William Street, in the Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the State Tax Commission, in the full and just sum of five hundred ($500.00) Dollars, lawful money of the United States of America, to be paid to the said the State Tax Commission, to which payment well and truly to be made, we bind ourselves our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed, with our seals and dated this 10th day of December, 1921.

Whereas, on the 18th day of October, 1921 the Court of Appeals of the State of New York entered its order and judgment against the Plaintiff-in-error, affirming the final order of Appellate Division of the State of New York, Third Department in the above entitled matter, and the said Bass, Ratcliff & Gretton Limited obtained a Writ of Error and filed a copy thereof in the Clerk's Office of said Court to reverse the said final order of judgment and a citation directed to the said Bass, Ratcliff & Gretton, Limited citing and admonishing them to be and appear at the Supreme Court of the United
101 States, at Washington, within 30 days from the date thereof.

Now, therefore, the Condition of the above Obligation is such, that if the said Bass, Ratcliff & Gretton, Limited shall prosecute their writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

BASS, RATCLIFF & GRETTON, LIMITED,
By CHARLES H. TAYLOR,
Agent and Attorney-in-Fact.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY.
By S. FRANK HEDGES,
Attorney-in-Fact.

Attest:
ADOLPHUS A. JACKSON,
Attorney-in-Fact.

Signed, and Delivered in the Presence of:
ROBERT C. BEATTY.

STATE OF NEW YORK,
County of New York, ss:

On this 14th day of December, 1921, before me personally appeared Charles H. Taylor, agent and attorney-in-fact of Bass, Ratcliff & Gretton, Limited with whom I am personally acquainted, who, being by me duly sworn said: That he resides in the State of New York that he is agent and attorney-in-fact of Bass, Ratcliff & Gretton, Limited the corporation described in and which executed the above instrument that he knows the corporate seal of said corporation; that no seal is affixed to the within instrument because such seal is not in the United States, and that he signed his name thereto as agent and attorney-in-fact by authority from the Board of Directors of said corporation.

[SEAL.] MADGE HARTUNG,
Notary Public, Kings County, No. 405.

Kings County Register No. 3165.
Certificate filed New York County No. 459.
New York Register No. 3351.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Appeal Bond with the original thereof filed in this office on the 11 day of Jan., 1922, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan. 1922.

[SEAL.] L. C. WARNER,
Clerk.

102 STATE OF NEW YORK,
County of New York, ss:

On the 10th day of December, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State

of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he is acquainted with Adolphus A. Jackson and knows him to be the Attorney-in-fact of said Company; that the signature of said Adolphus A. Jackson, subscribed to the within instrument, is in the genuine handwriting of said Adolphus A. Jackson, and was subscribed thereto by like order of said Board of Directors, and in the presence of him the said S. Frank Hedges.

JAMES A. STARR,
Commissioner of Deeds for the City of New York.

Term expires November 15, 1923.

Certificates filed in Richmond County and the following Counties: County Clerks' Nos.; New York 495, Kings 152, Queens 3946, Bronx 59.

Registers' Nos.; New York 23208, Kings 3147, Bronx 3058.

At a special meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 2nd day of June, A. D. 1921, the following resolution was unanimously adopted:

Resolved, That Alonzo Gore Oakley or Edw. R. Lewis or Adolphus A. Jackson or William H. Estwick or Gilman Ashburner or A. Van Tambacht or J. Frank Supplee or E. G. Babcock or C. D. Marsac or S. Frank Hedges or Charles E. Finken or Kern J. Mullen or Albert J. Rowland or Kenneth H. Wood or William S. Hering or Edward J. O'Shaughnessy, Attorneys-in-fact of this Company in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings, required or permitted in all actions or proceedings or by law required, including co-suretyship and reinsurance agreements, and all other bonds, undertakings or guarantees of whatsoever nature not specifically covered by the foregoing authority; such bonds, undertakings and agreements, however, to be attested in every instance by one other of the persons above named, as occasion may require, provided, that if such bonds, undertakings and agreements are not executed by either Alonzo Gore Oakley or Edw. R. Lewis or Aldolphus A. Jackson or William H. Estwick, then and in such event, said bonds, undertakings and agreements shall be attested by either the said Alonzo Gore Oakley or Edw. R. Lewis or Adolphus A. Jackson or William H. Estwick; and the aforesaid attorneys-in-fact are, and each of them is hereby authorized and empowered to certify a copy of this resolution under the seal of this Company.

STATE OF NEW YORK,
County of New York, ss:

I, S. Frank Hedges, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 10th day of December, 1921.

S. FRANK HEDGES,
Attorney-in-fact.

United States Fidelity and Guaranty Company,

Baltimore, Md.

At the Close of Business September 30, 1921.

Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$7,259,250.00	Government Bonds	$6,975,363.16
5,637,271.15	Baltimore City and other Municipal, State and County Bonds	5,060,133.86
2,454,600.00	Railroad and Equipment Bonds	2,087,044.75
255,000.00	Electric Railway Bonds	184,500.00
4,075,658.22	Public utility and Miscellaneous Bonds	3,695,670.75
305,890.00	Bank and Trust Company Stocks	593,607.00
169,725.00	Railroad Stocks	350,568.50
491,000.00	Miscellaneous Stocks	131,416.00
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets	123,500.00
$20,748,394.37	Total Bonds and Stocks—Market Values September 30th, 1921	$19,201,804.02
	Home Office Property appraised by Insurance Department of Maryland	750,000.00
	New York Property, appraised by Insurance Department of New York	917,866.91
	Other Property appraised by Insurance Department of Maryland	581,280.85

	Par value.	Market value.
Loans secured by pledge of Collaterals		47,896.54
Loans secured by Mortgages		47,500.00
Cash on Hand and in Depositories		3,061,026.94
Premiums in course of collection, not more than three months due		6,900,360.01
Deposits with Workmen's Compensation Reinsurance Bureau		370,242.01
Interest due and accrued		303,188.89
Due for Subscriptions, Department Guaranteed Attorneys		74,451.96
Other Assets		98,379.37
		$32,353,997.50

Liabilities.

Capital Stock paid in cash		$4,500,000.00
Due for Return Premiums and Reinsurance		106,947.40
Funds held under Reinsurance Treaties		89,711.63
Reserve for 1921 Taxes and Expenses in Transit		420,118.75
Commissions accrued on uncollected premiums		1,253,848.81
Premium Reserve Computed in accordance with Requirements of New York Insurance Department	$11,213,660.95	
Reserve for Claims Admitted and not Admitted, all Departments, in accordance with New York Laws	10,754,828.83	
Surplus	4,014,881.13	
		25,983,370.91
		$32,353,997.50

STATE OF NEW YORK,
County of New York, ss:

S. Frank Hedges, being duly sworn, says: that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of September 30, 1921, and that the financial condition of said Company is as favorable now as it was when such statement was made.

S. FRANK HEDGES.

Subscribed and sworn to before me this 10th day of December, 1921.

JAMES A. STARR,
Commissioner of Deeds for the City of New York.

Term expires November 15, 1923.
Certificates filed in Richmond County and the following Counties: County Clerk's Nos.; New York 495, Kings 152, Queens 3246, Bronx 59.
Registers' Nos.; New York 23208, Kings 3147, Bronx 3058.
103 [Endorsed:] County Clerk's File No. —. Court of Appeals: State of New York. People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, Plaintiff-in-error against State Tax Commission, Defendant-in-error. Appeal Bond. Office of Albany County Clerk, Albany, N. Y. 1922, Jan. 11, P. M. 3.30. Jan. 11-22. United States Fidelity and Guaranty Co. 47 Cedar Street, New York City, surety.

The within undertaking is approved as to form and as to the sufficiency of the surety.

FRANK HISCOCK,
Chief Judge Court of Appeals.

104 Court of Appeals, State of New York.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error.

against

STATE TAX COMMISSION, Defendant-in-Error.

Assignment of Errors.

Now comes the above named Bass, Ratcliff & Gretton, Limited and, in connection with the petition for writ of error by it, herewith says that, in the records and proceedings in this cause, and in the final judgment made and entered herein on the 26th day of November, 1921, by the Supreme Court of the State of New York in and for the County of Albany upon the remittitur from the Court of Appeals of the State of New York, there is manifest error, to wit:

First. The Court of Appeals of the State of New York and the Appellate Division of the Third Department erred in affirming the determination of the State Tax Commission and in refusing to vacate the tax imposed against the above named Bass, Ratcliff & Gretton, Limited, on the ground that the said tax and law under which it was assessed is unconstitutional as in violation of Section 2 of Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States.

Second. The Court erred in not adjudging said tax and the Corporation Tax Law of the State of New York under which
105 it was assessed and imposed against the above named Bass, Ratcliff & Gretton, Limited, unconstitutional as in violation of Section 2 or Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States, upon the following grounds:

(*a*) It taxes a large part of the plaintiff-in-error's net income earned in its business and received by it wholly without the State of New York, and taxes a large amount of its property located without the State of New York.

(*b*) It takes a proportionate amount of the net income of a foreign corporation determined by an arbitrary and set rule prescribed in said statute and having no relation to the actual net income of such corporation actually earned in the State of New York, nor the value of the income producing property in the State of New York, and thereby the plaintiff-in-error is unjustly taxed upon a large amount of its net income, all of which so taxed was earned and received wholly in foreign countries.

(*c*) It directly burdens and lays a tax upon interstate commerce.

Third. The Court erred in not holding that the said tax, even though considered as a franchise tax, is unconstitutional as being based upon property and income therefrom without the State of New York.

Fourth. The Court erred in holding that such tax is constitutional, although it is based on an allocation which includes the value of shares of stocks of other corporations owned by Bass, Ratcliff & Gretton, Limited, the plaintiff-in-error, to the extent only of ten (10%) per cent of its tangible real and personal property.

Wherefore the said Bass, Ratcliff & Gretton, Limited, prays
106 that the final order and judgment in the said Supreme Court of the State of New York entered in the office of the Clerk of the County of Albany on the 26th day of November, 1921, pursuant to the said remittitur of the said Court of Appeals of the State of New York be reversed and that judgment be rendered in favor of the plaintiff-in-error and annulling the said judgment and canceling the said tax and lien sought to be imposed upon its property, and for such other and further relief as may be just and proper in the premises, with costs in all the courts.

OLNEY & COMSTOCK.
Attorneys for Plaintiff-in-Error.

68 William Street,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK,
County of Albany,
Clerk's Office, ss:

I, Luther C. Warner, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy — Assignment of Error with the original thereof filed in this office on the 11

day of Jan., 1922 and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11 day of Jan., 1922.

[SEAL.] L. C. WARNER,
Clerk.

107 [Endorsed:] Court of Appeals, State of New York. People of the Sate of New York on the Relation of Bass, Ratcliff & Gretton, Limited, Plaintiff-in-Error, against State Tax Commission, Defendant-in-Error. Assignment of Errors. Olney & Comstock, Attorneys for Plaintiff-in-Error. No. 68 William Street, New York, N. Y. Office of Albany County Clerk, Albany, N. Y. 1922, Jan. 11, P. M. 3.30.

Read on Application, Dec. 23, 1921.

F. H. H.
Chf. Judge.

108 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LTD., Plaintiff-in-Error,

against

STATE TAX COMMISSION, Defendant-in-Error.

I, Charles D. Newton, Attorney General of the State of New York and Attorney of record for the defendant-in-error in the above entitled suit, hereby acknowledge due service of the herein citation and enter an appearance in the Supreme Court of the United States.

Dated, Albany, N. Y., December 28, 1921.

CHARLES D. NEWTON,
Attorney General of the State of New York,
Attorney for the Defendant-in-Error.

109 UNITED STATES OF AMERICA, *ss:*

To State Tax Commission, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the County of Albany, State of New York, wherein the People of the State of New York on the relation of Bass, Ratcliff & Gretton, Ltd., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment or order rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this 27th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

110 [Endorsed:] Supreme Court of the United States. People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, Plaintiff-in-Error, against State Tax Commission, Defendant-in-Error. Citation. Olney & Comstock, Attorneys for Plaintiff-in-Error, No. 68 William Street, New York, N. Y. 1922. County Clerk's Case No. 5303. Office of Albany County Clerk, 1922, Jan. 4, A. M. 9.07. Albany, N. Y.

111 New York Supreme Court, County of Albany.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error,

against

STATE TAX COMMISSION, Defendant-in-Error.

STATE OF NEW YORK,
County of Albany, ss:

I, L. C. Warner, Clerk of the Supreme Court of the State of New York, in and for the County of Albany, and Clerk of the County of Albany, pursuant to a writ of error directed to the Justices of the Supreme Court of the State of New York, in and for the County of Albany, which said writ was allowed by Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, and signed by the Clerk of the United States District Court, for the Northern District of New York, do hereby certify that the writing hereto attached is a true, complete and perfect copy of the record, assignment of errors, petition and bond, and all proceedings entitled People of the State of New York on the Relation of Bass, Ratcliff & Gretton, Limited, plaintiff-in-error, against State Tax Commission, defendant-in-error, as the same remains on file and on record in said case in my office; that attached to said papers is the writ of error, allowance of writ of error, citation with proof of service thereof, all filed in the office of this court and the same are the originals thereof.

112 In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Albany County this 11 day of Jan., in the year of our Lord, one thousand nine hundred and twenty-two.

[Seal of County of Albany.]

L. C. WARNER,
Clerk.

113 Supreme Court of the United States, October Term, 1921.

#714.

PEOPLE OF THE STATE OF NEW YORK on the Relation of BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error,

against

STATE TAX COMMISSION, Defendant-in-Error.

It is hereby stipulated that, the Court of Appeals of the State of New York having added to its opinion now officially reported in the above case a citation which was not contained in the certified copy furnished by the official reporter of the Court of Appeals of the State of New York, which certified copy was included in the certification of the record herein, such citation be added to the record heretofore certified to the Supreme Court of the United States by the Clerk of the County of Albany, State of New York; that such officially reported opinion is contained in 232 N. Y. 42, and immediately after the citation of Underwood Typewriter Company vs. Chamberlain, 254 U. S., 113, the additional citation of Postal Telegraph-Cable Co. vs. City of Fremont, 255 U. S., 124, 127, should be added; and that the Clerk of the Supreme Court of the United States be requested to add the foregoing additional citation, so officially reported, to the printed record in this case.

Dated, New York, February 1, 1922.

OLNEY & COMSTOCK,
By ROBERT C. BEATTY,
Attorneys for Plaintiff-in-Error.
CHARLES D. NEWTON,
Attorney General, Attorney for Defendant-in-Error.
CLAUDE T. DAWES,
Of Counsel for Defendant-in-Error.

114 [Endorsed:] File No. 28,669. Supreme Court U. S., October Term, 1921. Term No. 714. Bass, Ratcliff & Gretton P. E., vs. State Tax Commission. Stipulation of counsel and addition to record. Filed Feb. 9, 1922. Chas. D. Newton, Attorney.

Endorsed on cover: File No. 28,669. New York Supreme Court Term No. 714. Bass, Ratcliff & Gretton, Limited, plaintiff in error, vs. State Tax Commission. Filed January 24th, 1922. File No. 28,669.

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THE NEW YORK TAX CASES

Supreme Court of the United States

OCTOBER TERM, 1923.

BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error, against STATE TAX COMMISSION, Defendant-in-Error.	No. 24.
GORHAM MANUFACTURING COMPANY, Appellant, against STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York, Appellees.	No. 14.

BRIEF FOR PLAINTIFF-IN-ERROR AND APPELLANT.

These cases involve the question of the validity under the Constitution of the United States of

Article 9-A of the New York State Tax Law, and for this reason one brief is filed in both cases.

In the Bass case, a writ of error was allowed to the Supreme Court of the State of New York.

In the Gorham case, an appeal was taken from a final decree of the United States District Court for the Southern District of New York, dismissing the amended bill of complaint upon the merits in an equity suit.

In both cases the Courts below sustained the constitutionality of the law in question as applied by the New York State Tax Commission to the plaintiff-in-error and the appellant respectively.

The Proceedings in Each Case.

Bass Case.

The Tax Commission assessed a corporation tax under said Article 9-A against Bass, Ratcliff & Gretton, Ltd., the plaintiff-in-error, a British corporation, of $826.14 for the tax year beginning November 1, 1918, based on the fiscal year ending June 30, 1918 (R., p. 28).

On rehearing this tax was affirmed. A writ of certiorari was sued out by the plaintiff-in-error to review such determination and heard on writ, petition and return in the New York Supreme Court, Appellate Division, Third Department, where the determination of the State Tax Commission, defendant-in-error, was affirmed without opinion (R., pp. 1-36). An appeal was taken to the Court of Appeals (R., p. 37), which affirmed the order of the Appellate Division (R., pp. 40-43, 62; reported in 232 N. Y. 42). Final judgment thereon was

entered in the Supreme Court (R., p. 45). On petition of the plaintiff-in-error (relator below) a writ of error was allowed (R., pp. 48-61).

Gorham Case.

The Gorham Manufacturing Company, a Rhode Island corporation, sued in equity to have the tax assessed against it for the year ending October 31, 1918, under said Article 9-A, amounting to $13,582.56, adjudged void and canceled of record, and to restrain the defendants from collecting such tax upon the ground that the tax was in contravention of the Federal Constitution (Complaint, R., pp. 1-5, as amended by Stipulation, R., pp. 21-22).

The defendants interposed separate answers and the case was tried and determined on the merits by the dismissal of the complaint as amended (Answers, R., pp. 5-10; Final Decree, R., pp. 48-49). An opinion was written by Judge Learned Hand (R., pp. 42-48; reported 274 Fed. 975).

A direct appeal was allowed to this Court, as the question involved was the constitutionality of said Article 9-A (R., pp. 49-55).

Lemke v. *Farmers Grain Co.*, 258 U. S. 50.
Davis v. *Wallace*, 257 U. S. 478.

By reason of changes in office and in the Tax Law, this Court permitted the substitution of the State Tax Commission and the present Attorney General of New York as appellees herein (Reported 261 U. S. 1).

The Question Involved.

The question here involved is the constitutionality of Article 9-A of the Tax Law of the State of New York under the Fourteenth Amendment and the commerce clause of the Constitution.

This tax law imposes upon every domestic manufacturing and mercantile corporation, and upon every similar foreign corporation, "for the privilege of doing business in this State," an annual tax, to be computed "upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States," or, under the statute as amended retroactively April 18, 1918, "which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States" (Sec. 209; printed *infra,* pp. 7 and 8).

If the corporation does business within and without the State, such net income is allocated in the proportion which the aggregate of the monthly averages of certain specified assets in the State bears to the aggregate of the monthly averages of such specified assets wherever located. In both instances, the assets are only a part of the total assets. These artificially selected assets are bills and accounts receivable, real property and tangible personal property, and the stock of other corporations (Sec. 214; printed *infra,* pp. 8 and 9).

Bass, Ratcliff & Gretton, Ltd., brews Bass' ale in England, and imported and sold a small percentage of the product in New York State during the year in question. During this year *"its net income from the New York business was nothing"* (Opinion of

Court below, R., p. 41). Nevertheless, because it had within the State a small portion of its assets yielding, however, no net income, it was taxed the sum of $826.14, being 3 per cent. upon the allocated amount of $27,537.68 of its total net income received during the year, and, therefore, upon "a portion of its net income earned wholly outside the State" (Opinion below, R., p. 42).

The Gorham Manufacturing Company has a large manufacturing plant in Providence, Rhode Island, where it manufactures silverware and kindred products. For the year in question, it also manufactured and sold munitions. All manufacture was in Rhode Island. Such manufacture and the sale of its products in all of the States of the Union and in some foreign countries was its entire business. It manufactured silverware and other metal products to the extent of 42 per cent. of its business, one-quarter of which were sold in New York, the only business done there. The remaining 58 per cent. of its business was the manufacture and sale of munitions, conducted wholly without the State of New York. Its actual income in New York during the year in question, derived entirely from the sale of silverware and kindred products manufactured in Rhode Island, was no more than $180,000, 8⅔ per cent. of its total net income, if all income from New York sales is presumed to be earned in New York and none credited to the process of manufacture by it in Rhode Island. If manufacture be credited with one-half, the net income actually earned in New York is reduced to $90,000. Nevertheless, for the year in question, $452,752, or 21⅔ per cent. of its total net income, was allocated to New York because that

percentage of the allocating items were situated in New York. This income, taxed at the rate of 3 per cent., resulted in the tax of $13,582.56 complained of. Such income taxed was two and one-half to five times as great as that actually earned in New York, where only 10½ per cent. of the total sales were made.

This gross inequality is due to the arbitrary provisions of the statute. The effort is made to ascertain New York's share of net income by allocating the *total net income everywhere* instead of that arising from sources within the State, and this on a basis which *conclusively* presumes a fixed net income to every dollar of ratio assets.

Real estate, tangible personal property and other factors in the allocating ratio, whether income producing or not, are presupposed to produce profit in exact proportion to their actual value. No attempt is made to include all income producing factors. On the contrary, cash sales and intangible property, together with other important factors, are ignored. Such allocation does not and cannot operate to separate the income earned in the State from that earned without. *No discretion as to the method of allocation is vested in the Tax Commission for the purpose of revision or otherwise.*

The consequence of the application of this inflexible formula to the cases at bar is a tax in an unreasonable amount, being many times the income earned by the taxpayer in New York. In the Bass case it actually and indisputably taxes a net income non-existent locally. The records here thus supply the proofs lacking in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113.

1. Can a State constitutionally levy a tax computed on an allocated part of the total net income

of a foreign corporation, where the allocation, for no reason in law or economics, includes certain arbitrarily selected factors, and omits other factors equally important, none of the factors chosen being determinative of net income, when the result is to allot far more income thereby to New York than could have been earned therein; and thus employ income totally unrelated thereto to enlarge the measure of the tax?

2. Is not such tax upon the property or income, earned without the State, of a foreign corporation (engaged principally in the Gorham case in interstate commerce, and in the Bass case in foreign commerce), a direct burden upon such commerce, and, therefore, unconstitutional?

The assignments of errors which raise these questions are printed in the Appendix (*infra*, pp. 57-60).

The Statute.

The statute in question is a new form of corporate taxation for New York, enacted in 1917 and amended in 1918. It is Article 9-A of its Tax Law. The important parts relevant to the cases at bar are Sections 209 and 214. They are as follows:

Section 209. FRANCHISE TAX ON CORPORATIONS BASED ON NET INCOME. For the privilege of exercising its franchises in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state, every foreign manufacturing and every foreign mercan-

tile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 276, in effect April 19, 1918.)

Section 214. COMPUTATION OF TAX. If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation as returned to the United States treasury department for such fiscal or calendar year.

If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of the net income, to be determined in accordance with the following rules:

The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state,

2. The average monthly value of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within the state, (b) tangible personal property manufactured or

shipped from within the state and (c) services performed within the state,

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total value of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within and without the state, (b) tangible personal property manufactured or shipped from within this and other states and countries, and (c) services performed both within and without this state,

6. The average total value of the stocks of other corporations owned by the corporation.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

The Gorham case arises under the 1917 statute, before amendment, except that the amendment of 1918 to Section 209 is stated to be retroactive.

The Bass case arises under the statute as amended in 1918; the only difference between the original Act and as amended in 1918, in so far as pertinent here, being that in 1918 a limitation was placed upon the amount of stock of other corporations owned, so that in such allocations such stocks could only be included to an amount not exceeding 10 per cent. of the real and tangible personal property (Sec. 214, as amended in 1918; printed in Appendix, pp. 73-75). This provision was held unconstitutional by the Court of Appeals and presents a point in the Bass, but not in the Gorham case (*People ex rel. Alpha Portland Cement Co.* v. *Knapp*—Point V, *infra*, pp. 48-49).

The Facts.

The Bass Case.

The facts in the Bass case are not disputed, and are as stated in the opinion below (232 N. Y., at p. 45; R., p. 41), as follows:

> "Relator is a foreign manufacturing corporation organized under the laws of Great Britain and authorized to do business in the state of New York. For the privilege of doing business in this state it must annually pay in advance for the year beginning November first next preceding an annual franchise tax to be computed by the tax commission upon the basis of its net income for the year preceding. (Tax Law [Cons. Laws, ch. 60], §209.) Its business in New York was the importation and sale of Bass Ale manufactured at Burton-on-the-Trent. The question is as to the amount of the annual franchise tax for the year beginning November

1, 1918. It had in the year 1918 total segregated assets wherever located $3,212,405; actual value of shares of stocks of other corporations $845,195, a total of $4,057,600. Limiting the value of such shares to ten per centum of the aggregate real and tangible personal property (Tax Law, §214, subd. 6), the commission found total assets of $3,501,483; assets in New York $44,117. Its total net income for the year was $2,185,600. Its total sales in New York for the year amounted to about $240,000. *Its net income from the New York business was nothing.* The state tax commission under section 215 of the Tax Law providing for the computation of the tax by a comparison of total assets with assets in New York, allocated as taxable income to the state of New York the sum of $27,537.68, and computed a tax thereon at the rate of three per cent., amounting to $826.14. This tax was in lieu of all other taxes on personal property, capital stock or income (Tax Law, §219-j; §350, subd. 7)." (Italics ours.)

The fiscal year in question ended June 30, 1918. The business of the plaintiff-in-error was the brewing of Bass ale at Burton-on-the-Trent, England, and the sale thereof throughout the world. A very small part of its total product was imported and sold in the United States, of which 93 per cent. was sold in New York, 7 per cent. in Illinois. Two reports were made to the State Tax Department. The first expressly stated the net income for the fiscal year ending June 30, 1918, as reported to the United States Treasury Department, to be none (Exhibit A, R., p. 11). Only the segregated assets in the United States and New York were reported, totals respectively being $46,363.38 and $44,117.62

(Exhibit A, R., p. 12). The Tax Department called for an amended return showing the entire net income of the corporation on the ground that it was organized under the laws of a foreign country, and a segregation of its total assets (Exhibit B, R., pp. 13-14). Such amended report was filed (Exhibit C, R., pp. 14-17) under protest (Exhibit D, R., p. 17), and again showed the net income reported to the United States Treasury Department to be none, and reported a foreign net income of $2,185,600.

The Gorham Case.

The appellant is a Rhode Island corporation duly licensed to do business in New York (R., p. 11). Its offices, principal place of business and manufacturing plant are at Providence, Rhode Island, where all manufacturing is done. Its manufacturing plant consists of some thirty acres of land, with over forty buildings thereon, of substantial construction (R., pp. 22-23).

The entire business of the company consists of manufacturing various products at Providence, Rhode Island, and selling such products manufactured by it to merchants and other customers in all States of the United States and in some foreign countries (R., pp. 22-23).

It specializes in the manufacture of silverware and bronzes (R., p. 23). During the year in question, it also manufactured and sold munitions for war purposes, devoting two or three of its buildings solely to that purpose (R., p. 28). Its silverware business was carried on by manufacturing at Providence, Rhode Island, and selling at Providence, Rhode Island; New York City, New York; Chicago,

Illinois; San Francisco, California, and elsewhere (R., pp. 23, 29). It also has offices and show rooms in Chicago, Illinois, and San Francisco, California (R., p. 29).

The only business done in New York was the sale of silverware and kindred products; the munitions business was entirely extraneous to the state.

The appellant was assessed by New York a tax of $13,582.56 under said Article 9-A for the year beginning November 1, 1917, based on the income of its fiscal year ending January 31, 1917 (R., pp. 26-27).

Its tax return as amended showed, as required by the statute (Sec. 211, Appendix, pp. 62-63), a total everywhere of the average monthly value of bills and accounts receivable for personal property sold, of real and tangible personal property and stocks of other corporations of $14,565,748.41, and a total value of similar assets in New York of $2,505,116.71; also a net income, as reported to the United States for Federal income taxation, of $2,089,059.64 (R., pp. 12, 26; Exhibit 4, pp. 76-81).

The Tax Commission increased such aggregate value everywhere to $15,315,042, and the aggregate in New York to $3,319,154. *By the mandatory provisions of the statute* only the value of the items above specified were included in the returns and the Commission's revision thereof. None other (such as cash sales, cash on hand or in bank, patents or patent rights, good-will, and trade-marks and names) was taken into consideration, nor under the statute could be, either by the taxpayer or the Commission (R., pp. 26-27, 76-81).

From these figures the Commission compared the New York value with the total value of the items reported, the percentage being 21.67 per cent., and,

therefore, under the arbitrary mandate of the statute, allocated 21.67 per cent. of the total net income to New York, or $452,752. This, taxed at 3 per cent., produced the tax complained of (R., pp. 26-27). The statute did not permit the Commission to find the true amount of the net income earned in New York. In the record (p. 35), Mr. Merrill, Tax Commissioner, admits that "bills and accounts receivable have no relation whatever to sales." Further proof emphasizes this (Q. 52. "That is, the figures required to be returned on the State tax were not such as can produce the proportion of income earned within the State?" A. "No; they are not"—testimony of Mr. Downs, appellant's supervising accountant, R., p. 19.)

The only business done in New York was the sale of silverware and kindred products—all manufactured in Rhode Island, hence the only net income earned there is limited to that derived from such local business. During the fiscal year in question its total sales of silverware and kindred products everywhere were $5,029,158.47—its total net income therefrom everywhere $723,084.55—a rate of return of 14.38 per cent. (R., pp. 23-24). *On its said sales or business done in New York the appellant did not realize any substantially greater average net profit than it realized on sales of its merchandise, other than munitions, outside of New York* (R., pp. 23, 24). Its sales in New York of said silverware and kindred products were $1,244,396.83; its net income therefrom therefore could not exceed about $180,000 (New York sales $1,244,396.83 × 14.38 per cent. average profit), or only 8⅔ per cent. of its entire net profits, and not 21⅔ per cent., as allocated by the Tax Commission.

During the year in question the taxpayer's total business everywhere was $11,913,704.27. Of this, $6,884,545.80, or 58 per cent., consisted of the manufacture and sale of munitions, wholly at Providence, Rhode Island. The balance, $5,029,158.47 or 42 per cent., was the manufacture and sale of silverware and kindred products. Of the latter, New York sales amounted to $1,244,396.83, being 10½ per cent. of the total sales of all products and one-quarter of all the sales of silverware and kindred products. Of the balance, $3,402,540.02 was sold outside New York; and $382,221.62 ($434,342.74 less 12 per cent.) was sold at Providence and shipped to New York for delivery on prior orders. So of its total sales of all products, $10,669,307.44, were sales outside of New York State (R., pp. 23, 24, 26, 37).

The net income from munitions was $1,365,975.09 (65½ per cent. of the total net income) at a rate of profit of 19.55 per cent. as against the rate of 14.38 on silverware.

The net profit on silverware and kindred products everywere was $723,084.55, of which one-quarter (sales in New York) is $180,770. This is less than 8⅔ per cent. of the total net income of $2,089,059.64, *while the tax is upon 21.67 per cent. or $452,752 of the total net income.*

But even that figure of $180,770 of net income from New York sales is far above net earnings in New York, for it results from the sale of its own products, all of which are manufactured at its factory in Providence, Rhode Island.

As was recognized in the *Underwood* case (*infra*, pp. 26-27), the process of manufacture is a very important contribution to the net profits resulting from the manufacture and sale of goods. It would

not seem an unfair apportionment to say that one-half of such net profits resulted from the extra-state manufacture. (It was admitted on the trial by Mr. Merrill, Tax Commissioner, that "a part of the profits are realized in both States," R., p. 23).

We thus have to deal here with a range of local net income of 4⅓ per cent. or $90,385 to 8⅔ per cent. or $180,770, the latter the maximum of all the net income to be attributed to the sale of the goods in New York *and their manufacture in Rhode Island,* as opposed *to a tax upon 21⅔ per cent. or $452,752 of the net income wherever earned.*

While gross sales are not necessarily a safe guide in allocating net profits, the record here discloses that gross sales determine the limits of the New York net profits; for no greater profit was realized on the goods in New York than on similar goods sold elsewhere.

In view of the arbitrary stress laid in the allocation upon the situs of accounts and bills receivable and the ignoring therein of cash sales, the following facts are of special importance:

The entire business done by the appellant in New York consisted of sales of silverware and kindred products manufactured in Rhode Island, all of which resulted in accounts receivable (R., pp. 35, 37, 39). The munitions, all made and sold outside New York, were paid for in cash on delivery, or sometimes in advance, and there were no bills and accounts receivable arising from this cash business (R., p. 32).

The sales in New York were according to the following method: Goods were shipped from the factory at Providence to its selling agent, The Gorham Company, a different entity, which held them in stock, as consignee (R., pp. 34-

35, 39). When these goods were sold to the customers of this agent, the plaintiff took them out of consignment account and charged them to it, giving rise to an account receivable from such agent (R., p. 35). Only orders received by the agent for goods not in stock ($382,221.62) were forwarded to Providence, where they were accepted and filled by the appellant, and the goods sent to the agent at New York, marked for the customer (R., p. 40).

POINT I.

The tax imposed by Article 9-A of the New York Tax Law upon these foreign corporations is unconstitutional as in effect taxing their income and property without the State.

Wallace v. *Hines*, 253 U. S. 66.
Union Tank Line Co. v. *Wright*, 249 U. S. 275.
Meyer, Auditor of Oklahoma v. *Wells Fargo & Co.*, 223 U. S. 298.
Fargo v. *Hart*, 193 U. S. 490.
People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48. See also memo. on denial of motion for reargument, 231 N. Y. 516. Petition to United States Supreme Court for writ of certiorari denied June 6, 1921, 256 U. S. 702.
International Paper Co. v. *Massachusetts*, 246 U. S. 135.
Looney v. *Crane Co.*, 245 U. S. 178.
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1.
Galveston H. & S. A. R. Co. v. *Texas*, 210 U. S. 217.
Delaware, L. & W. R. R. Co. v. *Pennsylvania*, 198 U. S. 341.

The tax is entitled a "Franchise Tax." The immateriality of the title of such a tax is settled. In *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113, the Court in dismissing this point said, at page 120:

> "It is contended that the tax violates the Fourteenth Amendment because directly or indirectly it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income, for 'the argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question arising under the Federal Constitution.' *Shaffer* v. *Carter,* 252 U. S. 37."

The facts *supra* show that in the Bass case net income earned wholly in foreign countries was used as the measure of the tax, while in the Gorham case income from two and one-half to five times the amount earned in New York was taxed; this range depending on whether earnings should be attributed in part to the place of manufacture.

If one-half the net income from manufacture and sale be attributed to the place of manufacture (*supra,* p. 16), in the Gorham case the allocation to New York of $452,752 of net income on the selling end alone of a business of $1,244,396.83 becomes grotesque. To justify it the total profits on the goods sold in New York must have been twice $452,752, or $905,504, a profit ratio of over 72½ per cent., as contrasted with 14.38 per cent., the actual margin of profit on this business, as shown by the record. Furthermore, the total net income from the entire silverware and kindred business, everywhere, was only $723,084.55.

The actual profit on the goods sold in New York was about $180,000. If one-half thereof be allocated to Rhode Island, *the income actually earned in New York was about $90,000, or $360,000 less than the amount allocated under this statute.*

If a taxing measure purports to value the privilege of doing business within the State, it cannot arbitrarily inflate that value by operations which take place beyond its borders; neither can the taxing power increase the value of property which it taxes by attaching thereto some unrelated factor.

A State may not tax the property employed nor the business done without the State. Neither may it tax the profits therefrom as such nor by taking them as a measure for the tax. This Court has said in effect that the State may tax the tree or the fruit of the tree (*Shaffer* v. *Carter,* 252 U. S. 37, 50, 51). If the tree is situated outside the State, it cannot be taxed by the State. Something more than a legislative fiat is then necessary to bring the fruit within.

This statute is inherently arbitrary, and therefore invalid, because it wholly, or at least in a substantial degree, disregards realities and is thus intrinsically unworkable as a formula for allocating income, as the tax measure, with a fair degree of accuracy. Where income is the measure, the formula must be tested on the basis of the substantial (not necessarily mathematical) correctness with which it divides income into state earned and extra-state earned (see Point II, *infra,* pp. 28-39).

A statute purporting to allocate income to the State must show a real design to accomplish that result. If it prescribes a rigid formula, leaving

no discretion in the taxing authorities to correct inequalities, its validity depends upon the relation of the factors prescribed therein to this essential aim. If no such relation exists, the method is arbitrary. "Taxes must follow realities, not mere deductions from inadequate or irrelevant data" (*Union Tank Line Co.* v. *Wright,* 249 U. S. 275, at p. 286).

This reasoning is in truth the fundamental basis of the unit rule which, however, has been expressly limited to common carriers (*Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194; 166 U. S. 185), but even within its limits the unit rule has never sanctioned an arbitrary or artificial basis for computation (*Fargo* v. *Hart, supra; Meyer etc.* v. *Wells, Fargo & Co., supra; Union Tank Line Co.* v. *Wright, supra; Wallace* v. *Hines, supra*).

To quote from *Wallace* v. *Hines, supra,* page 69:

> "The only reason for allowing a state to look beyond its borders when it taxes property of foreign corporations is that it may get the true value of things within it when they are part of an organic system of wide extent, that gives them a value above that which they otherwise would possess. *The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state.* Therefore, no property of such an interstate road situated elsewhere can be taken into account *unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.*"

Such cases establish the invalidity of the statute in question as taxing net income of foreign corpo-

rations without the State. In those cases, as here, the taxpayer was a foreign corporation doing business in and out of the State and the amount of property taxable was determined by a proportion of the selected local assets to their total everywhere. In *Fargo* v. *Hart, supra,* the property taxed was the market value of the stock; in *Wallace* v. *Hines,* the right to do business locally, measured by the value of stocks and bonds. In both cases, such value was proportioned to the State according to the ratio of mileage in to everywhere. In the *Meyer* case, the property taxed was that part of the total gross receipts equal to the proportion of local business to total business. In *Union Tank Line Co.* v. *Wright,* the property taxed was that part of the total value of property everywhere equal to the proportion that the miles of railroad in the State over which the tank cars moved bore to the total of like mileage everywhere.

The tax was held void by this Court in all of these cases because its basis or measure included extra-state property. This fact rendered all other considerations immaterial. The inquiry was held objective and not subjective and the formula, means or method by which the tax was arrived at unavailing to save the statute and tax. Thus, in *Union Tank Line Co.* v. *Wright, supra* (italics ours), page 282:

> "A State may not tax property belonging to a foreign corporation which has never come within its borders—to do so *under any formula* would violate the due process clause of the Fourteenth Amendment,"

and page 286:

> *"Under no formula* can a State tax things wholly beyond its jurisdiction."

In *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra,* the Court of Appeals held two features of this law unconstitutional. It was held that Article 9-A, here in question, imposing a tax upon foreign corporations for the privilege of doing business in New York, is unconstitutional in so far as it directs that the income of bonds and stocks shall be included in the allocated income on which the tax is computed but the principal thereof disregarded in the allocation of assets.

The Court, however, thought *on the record before it* that these unconstitutional features could be severed from the other portions of the law, so that the order of the Appellate Division setting aside the whole tax as unconstitutional was reversed and the proceeding remitted for the revision of the assessment accordingly. This decision, limited to holding a part of the law unconstitutional, was by a divided court, Hiscock, *Ch. J.*, and Collin, *J.*, dissenting and voting for affirmance on the ground that the statute is unconstitutional.

Thus two Judges of the Court of Appeals and three Justices of the Appellate Division thought that this statute was wholly unconstitutional as taxing property of a foreign corporation outside the State. Four Judges of the Court of Appeals thought the two features particularly complained of were unconstitutional but separable; and one Judge of the Court of Appeals and the two dissenting Justices below thought the statute constitutional. The opinions below are reported in 191 App. Div. 262.

The record in the *Alpha* case, however, confined as it was to the contentions relating to bond interest and dividends, did not present the many other particulars in which the allocation of income is inherently arbitrary under the mandatory segregation of assets of the statute.

In that case severance was resorted to, to save the statute, because it seemed possible to lop off the only two diseased limbs to which the attention of the Court was directed. Even though such an operation was deemed possible on the proofs in the *Alpha* case, it can have no general application. The arbitrariness and unreasonable result of the statute are here beyond cure, for in its present application these relate to the whole trunk of the allocating ratio and not to separate limbs.

In Judge Cardozo's opinion in the Court of Appeals in the *Alpha* case, he states at page 52:

> "No assets not included in the enumerated classes are to enter into the ratio. The scheme of allocation takes no heed of investments in bonds and like intangible assets (Secs. 208, 214)."

Again, at pages 55-56:

> "I think the statute is invalid in its application to the relator, in so far as it lays upon income a burden that is irrespective of the situs of the assets by which income is produced. * * * The state may not say that the right to conduct the local business shall be lost if the corporation will not pay a tax upon property which, by reason of its situs elsewhere, is immune from taxation here. * * * In determining whether the tax is in truth a tax on property, we are to con-

sider, not its form or label, but its practical operation."

Again, at page 57:

> "A burden, arbitrarily swollen by resort to foreign assets, is not saved by the label which identifies it as a tax upon a local privilege.
>
> Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income."

Again, at pages 58-59:

> "Here, as there, the statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds and shares in other states, involves an artificial and arbitrary augmentation of the value of the local privilege. It measures the value of the franchise, here and elsewhere, *by income from all sources, and excludes some of the same sources when the value is apportioned.* To take from assets elsewhere is equivalent to adding to assets here. The statute would be little different in principle if it announced the arbitrary rule that all investments in bonds and stocks should be conclusively presumed to have their situs in New York. The resulting vice in the proportion is not the consequence of adventitious circumstances, of inequalities developing unexpectedly in the practical workings of the statute, but hardly to be avoided by reasonable foresight. The exclusion of bonds and stocks is the result of an explicit mandate. The principle of allocation is not followed to its natural and obvious outcome in accordance with the situs of the assets, but is consciously checked, its normal course is thwarted, by an artificial and designed

> exception. Something which, in the absence of express exclusion, would be within its operation, is knowingly taken out of it. *I am unable to avoid the conclusion that a method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only, and close his eyes to all the others, is arbitrary and unreasonable in its increase of the local burden.*" (Italics ours.)

Excluding the severance feature, which cannot be applied here, this reasoning in the *Alpha* case is especially in point. The inclusion there of interest and dividends was condemned because the sources thereof were not considered in the allocating ratio. Here other more important income-producing factors are excluded, while the income therefrom is allocated. This affects the entire allocating ratio and thus condemns the entire statute.

In *Underwood Typewriter Co.* v. *Chamberlain, supra,* the excise on the right to do local business was measured by that part of the total net income equal to the proportion of the value of the local tangible personalty and realty to their total everywhere, and there was applied the rule of *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 222, that the taxpayer has the *onus* of showing that extra State property was taxed and thus that income was allocated to the State in excess of that actually earned there. This Court held (p. 121) that the plaintiff failed to sustain

> "the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufac-

> ture" (in the taxing State) "of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs. * * *. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result.
>
> We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution."

The case was decided upon the failure of the taxpayer to prove what is conceded in the Bass case and demonstrated in the Gorham case—the measuring of the tax by income foreign to the State, there being, respectively, no local income or but a small part of that taxed.

See, also, cases cited at beginning of this Point.

The consequences of legalizing taxes such as the present appear in *Western Union* v. *Kansas,* 216 U. S. 1, at page 37:

> "It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burden such commerce but by taxation upon property situated beyond its limits."

The same thought is expressed in *Postal Tel. Cable Co.* v. *Taylor,* 192 U. S. 69, 72, where in de-

claring an ordinance, imposing an excessive license fee on the poles and wires of an interstate telegraph company, invalid—even if an exercise of police power—the Court said that it would result "in a rate of taxation which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company."

POINT II.

The method of apportionment prescribed by Section 214 of Article 9-A of the New York Tax Law is inherently arbitrary.

Union Tank Line Co. v. *Wright, supra* (p. 283), supplies the test for inherent arbitrariness, as follows:

> "In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—

> the challenged assessment specified $291,196.
>
> We think plaintiff-in-error's property was appraised according to an arbitrary method, which produced results wholly unreasonable, and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

The real value of income produced in New York cannot be ascertained with approximate accuracy by the statute in question and the statute is therefore inherently arbitrary for the following reasons:

1. It attempts an allocation of the *entire net income,* rather than that local or partially within and without, and as such includes that which is foreign. (In the Bass case only foreign income is allocated.)

> "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it *when they are part of an organic system of wide extent that gives them a value above what they otherwise would possess*" (*Wallace* v. *Hines, supra,* p. 69). (Italics ours.)

Neither the allocating assets nor the income are part of such a system. Being a manufacturing corporation, the presence of a plant in one jurisdiction and a store in another does not make it "an organic system of wide extent" (*Adams* v. *Ohio State Auditor,* 165 U. S., at p. 222; also dissenting opinion of Mr. Justice White, pp. 229-254; *Fargo* v. *Hart, supra; Meyer, Auditor of Oklahoma,* v. *Wells, Fargo & Co., supra; Union Tank Line Co.* v. *Wright, supra*). The so-called unit rule has never

been applied where no part of the basic measure was in the State as in the Bass case.

Contrast with this State method of allocation, the Federal treatment of *exactly the same problem of ascertaining the net income derived from the sale of personal property produced in whole or in part by the taxpayer without and sold within its jurisdiction.* The Federal Government limits allocation to the income from such sources and does not allocate *the entire net income* of the corporation (see also *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413). And allocation is only resorted to if, by accounting, the *actual* local net income cannot be ascertained (Rev. Act 1921, Secs. 217, 234; Regulations, Arts. 325, 328 and 573).

In the determination of the same question in the Bass case, the practical difference is that the Federal Government, by confining its allocation to the net income from the operations partially local, would not and did not tax the corporation, whereas the State, by its allocation of the entire net income, did tax it.

2. It allocates income from all sources but in proportioning ratio assets arbitrarily excludes many sources from the assets by which such income is allocated.

Net income is allocated in the proportion that local realty, tangible personalty, stocks and accounts and bills receivable from sales of tangible personalty and services, expressed in average monthly values, bear to the total of the like everywhere. In short, a comparison is made between the situs, local and foreign, of four classes of assets, two of which are usually regarded as capital (real

estate and stocks); one of which may be capital or turnover assets (tangible personalty), and the remaining one is a part of gross income (accounts and bills receivable) being either a proceed of a sale of tangible personalty or from services. "No assets not included in the enumerated classes are to enter into the ratio" (*Alpha* case, *supra,* 230 N. Y. p. 52).

Gross sales or gross receipts play no part in the ratio except as bills and accounts receivable appear. Cash sales are wholly disregarded. Sixty-five and a half per cent. of the Gorham's income was from cash sales, all extra-state.

Intangible sources of income (save stocks) are excluded from the allocating ratio. The income therefrom is allocated in accordance with the situs of other assets bearing no necessary relation thereto. Thus interest on a California bank account of a Rhode Island corporation may, in part at least, be brought into New York as a tax measure. The same treatment is accorded extra-state cash transactions which do not involve the ownership of any of the selected assets.

Income earned and received without the State of New York resulting from operations not involving the ownership of an asset of the selected classes is made to pay tribute to the State to the extent of the allocated percentage. An illustration would be cash commissions received without the State for the sale by it of the merchandise of another corporation.

A corporation manufacturing outside of New York largely increases the taxation on its income earned on the same business done in New York by leasing rather than owning its factory. Again, if

the cash business conducted wholly outside the State increases in profits and all other factors remain constant, the taxable income allocated to New York automatically increases although the New York business and actual income remains the same. In the last two examples, totally unrelated transactions, by the statute, have gone to swell New York's tax measure.

Goods sold for cash appear in the ratio as tangible personal property, but upon their sale drop out of the allocation. If credit be given, however, they appear again as bills or accounts receivable, and thus play a dual role in swelling the aggregate, though but one profit on such sale can result.

This allocation of income by sources other than those producing it, varies from the Federal method of handling the same problem. There, where allocation is resorted to, one-half the net income is allocated in accordance with the situs of property in and out, "held or used to produce income which is derived from sources partly within and partly without the United States," the other half in accordance with the gross sales in and out.

And this feature so far as it affected the allocation of interest from bonds where the bonds were omitted from the allocation has been held by the Court of Appeals to render the allocation *pro tanto* invalid as inherently arbitrary, in the *Alpha* case, *supra,* where the effect of the allocation of the statute in excluding bonds is said by Judge Cardozo (230 N. Y. 48, 58) to be:

> "It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned. To

take from assets elsewhere is equivalent to adding to assets here. The statute would be little different in principle if it announced the arbitrary rule that all investments in bonds and stocks should be conclusively presumed to have their situs in New York."

3. The purely arbitrary and unreasonable formula is based upon the inaccurate presumption that every dollar of ratio assets everywhere has the same yield of net income. As applied in the Bass case, it works out that every dollar of ratio assets everywhere is conclusively presumed to earn net income everywhere of 62 cents plus; this computation being, of course, based on the monthly averages of the ratio assets. This presumption is manifestly abnormal and dependent upon the fortuitous. It involves the obvious solecism, that per dollar of ratio assets, each element that goes to make up *net income,* to wit, gross income and deductions, is in the same proportion everywhere. That wherever you have the same ratio assets you will have the same income. The actual economic, political and other factors that govern this are disregarded.

Thus, real estate and tangible personal property, no matter how or where employed, whether income producing or not, are presumed to produce "statutory" income in direct proportion to their market value. Likewise with stocks.

Unproductive real estate and tangible personal property within the State become income producing under this statute, for they serve to bring into the State, for the purpose of taxation, income which actually is not there.

The relative rate of income from any income-producing assets of the selected classes becomes immaterial because all such assets are assumed to produce the same ratio of income as their intrinsic worth. This results in assets of small intrinsic value out of New York but yielding a large return of income being used to measure, and thus appropriate to the State tax, income earned and received without the State, the product of assets yielding such larger net returns.

Real or personal property yielding a large income and situated without the State is weighed in this allocation against like property situated within the State yet yielding no income whatever as is here shown in the Bass case. The effect can only be to tax income from such foreign assets earned and received without the State.

Bills and accounts receivable are to be used in the allocation at their face amount regardless of whether the transaction results in a profit, and thus yields net income, or a loss. Sales of merchandise may all be made at a loss in the year in question owing to the necessity of liquidating stocks in adverse market conditions. Yet the corporation may receive a large net income from other extra-state sources. That income is made tributary to New York in proportion to unproductive transactions not entering into the result. The larger the loss from sales in New York the greater the tax upon the other income, for the net thus earned must first bear the loss in New York before the tax is computed on the remaining net income. That is the situation in the Bass case. Such receivables are not a measure of anything except the *credit* which must perforce be given. Mr. Merrill, Tax

Commissioner, admitted on the trial in the Gorham case that "bills and accounts receivable have no relation whatever to sales" (R., p. 35).

The "proof of the pudding is in the eating" and the practical results here confirm the falsity of the presumption. In the Gorham case the artificial allocation exceeded reality from two and one-half to five times. In both cases, the foreign business was more profitable than the local, and such circumstances cannot be said to be unusual. One branch may lose while another makes, or one may make more than another, and this entirely irrespective of the character of assets. Under no stretch of the imagination can it be said to be the common experience that all branches or all corporations earn at the same rate, either per assets employed or per accounts and bills receivable or per a combination of both. The facts disclosed in the proofs here threw the entire allocating mechanism out of gear. What, therefore, can be said in favor of a machine that fails at the ordinary and succeeds only with the miraculous?

4. Allocation is on the basis of the "average monthly values" of the ratio assets. These are arrived at by ascertaining the value in each month, adding the twelve valuations, and dividing the result.

The "average monthly value" feature, particularly of bills and accounts receivable, is unrelated to the verities. For, under the statute, the longer a receivable remains uncollected, the greater is its income-producing importance (since it will go to swell each monthly total) until paid.

Under this formula, goods sold on credit give rise to two items in the scheme of apportion-

ment, their value before the sale and the bills and accounts receivable as a result of the sale. Goods sold for cash play a part just half as important, for their value before sale constitutes their sole role in the plan of allocation. Yet what merchant or manufacturer will not agree that a cash sale is preferable to one on credit, as a matter of net income? Furthermore, the length of the term of credit is, in reality, in reverse ratio to the profit of the transaction, since with companies like the parties here no interest is borne and the creditor is deprived of the use of its money for the time; but under the New York statute, the longer the taxpayer must keep the credit on its books, the greater part it plays in determining its tax. For it is the monthly average that counts, hence uncollectible credits appear month after month to increase the monthly average. The cash sales, on the other hand, made outside the State of New York, have the effect of increasing the amount of income allocated to New York by this taxing statute, for it removes an item, the property sold, which would otherwise add to the denominator of New York's statutory fraction and nothing results to take its place—quite contrary to the result of a sale on credit. This arbitrary disproportion is especially pertinent here, as the Gorham's munitions business, 65½ per cent. of its net income, was carried on entirely at Providence, was done on a cash basis and was wholly unrelated to New York.

Thus New York's treatment of sales, the foundation of income, in its allocating formula, ignores that which plays the largest part in the actual realization of income, viz., payments received, and magnifies that sworn enemy of actual profits, viz., frozen credits. If this is "reality," the Legislature

of New York has indeed revolutionized economics. Such legislative legerdemain may sound well in theory, but its application to a great commercial metropolis like New York City can only result in gross injustice.

Similarly "turnovers" in merchandise are given no weight under the "average monthly value" scheme which credits to goods, stale on the shelf, the same income producing effect as those which are sold a month after their manufacture; for the former, if held throughout the fiscal year, contribute to each monthly total, but produce no income, while similar goods promptly sold contribute no greater sum to the aggregate of the monthly totals, but yield numerous profits.

Bills and accounts receivable for goods sold in or shipped from New York State are taken at their face amount in the monthly average of bills and accounts receivable in the allocation, irrespective of whether the goods were manufactured within or without the State. From a sale of the former kind both manufacturing and selling profit within the State results, while in that of the latter class, the selling profit alone is income earned within the State.

The vagaries within the same kind of asset are as great as between different kinds. Bills and accounts receivable are given their value in each successive month, going to make up the monthly average for the year. Yet but one profit results and that from their payment. Thirty-day accounts are modestly charged in effect with but a single profit, but slow accounts are magnified in the allocation by attributing to them two, three, four or perchance twelve separate and distinct "profits," according to the number of months they reappear

unpaid upon the books of the corporation. By such legerdemain even the German mark might be stabilized.

5. The further indicia of arbitrariness in the formula is its failure to recognize an unreasonable result. It is immutable—unchangeable—and, notwithstanding an extra-state taking, it, and only it, can determine the tax (see Point IV, *infra,* pp. 41-48). Granting an unreasonable result, an extra-state taking—this cannot be corrected by the local forums (compare opinions, Andrews, J., and Cardozo, J., in *Alpha* case, *supra,* discussed *infra,* p. 46).

The conclusion to be drawn from a study of the scheme of allocation of this law is that it bears no relation to the net income received or earned either within or without the State, as the factors chosen are not determinative of the yield of any net income, its aggregate amount or the rate of return. Any approximation to the actual is accidental. The apportionment resulting is *not* income earned or received in the State of New York.

It may be asked what purpose such an illogical allocation serves. The answer is in the amount of taxes collected. All of the net income is subjected to the allocated percentage, from whatever source derived. Thus nothing may escape. All real estate and tangible personal property in the State enters into the measure and to these are added, largely by way of duplication, lest perchance something escape, all bills and accounts receivable of the classes specified, covering merchandise sold from its stores or stocks within the

State, manufactured or shipped from within the State, and for services performed within the State. Thus is secured an allocated part of foreign net income, notwithstanding it is earned and received without the State. This ingenious scheme may afford a temporary relief to the State Treasury, but such burdens on commercial intercourse with other states and nations can only injure in the long run the welfare of New York. Be this as it may, the vice lies in its injustice. It is the policy of Ishmael, its hand against the rest of the world.

POINT III.

A tax upon the property of a foreign corporation, engaged principally in interstate or foreign commerce, on its property without the State, is a direct burden on such commerce and is therefore unconstitutional.

Meyer, Auditor of Oklahoma, v. *Wells Fargo & Co.,* 223 U. S., 298.

Bowman v. *Continental Oil Co.,* 256 U. S., 642.

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S., 282.

Eureka Pipe Line Co. v. *Hallanan,* 257 U. S., 265.

Champlain Realty Co. v. *Brattleboro,* 260 U. S., 366.

Phipps v. *Cleveland Refining Co.,* 261 U. S. 449.

Western Union Telegraph Co. v. *Kansas,* 216 U. S., 1.

Looney v. *Crane Co.*, 245 U. S., 178.
International Paper Co. v. *Massachusetts*, 246 U. S., 135.

In the Bass case the business of the plaintiff-in-error consisted of brewing Bass' ale in England, the greater bulk of which was sold throughout the World, and only a comparatively small part of which was sold in New York. It was thus engaged in foreign commerce.

In the Gorham case the entire business of the appellant consisted of manufacturing various products at Providence, Rhode Island, and selling such products manufactured by it to merchants and other customers in all states of the United States and some foreign countries. It was thus chiefly engaged in interstate commerce (R., pp. 22, 23).

When goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation.

Dahnke-Walker Milling Co. v. *Bondurant*, *supra.*

To tax the net income earned wholly without the State in interstate or foreign commerce is to place a direct burden upon such commerce; for the State of New York appropriates to itself a substantial part of the net earnings therefrom. The burden is too clear to require any amplification of this point.

POINT IV.

The equity suit in the Gorham case is properly brought, as the Tax Commission had no power to remedy matters therein complained of.

Atlantic Coast Line R. Co. v. *Daughton,* 262 U. S. 413.
Wallace v. *Hines,* 253 U. S. 66.
Dawson v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288.
Eureka Pipe Line Co. v. *Hallanan,* 257 U. S., 265.
Turner v. *Wade,* 254 U. S. 64.

This point has no application to the Bass case, for resort was had there to the State Tax Commission and to the local courts and both proved unavailing.

The Gorham Manufacturing Company has no adequate remedy in the review of the Tax Commission's determination by *certiorari.* It is the owner of a leasehold upon which the tax in question is made a lien by the statute and is thus a cloud on the title thereto. The statute provides for drastic remedies for non-payment of the tax, together with heavy penalties for delay in payment. Execution may be levied on all the property of the plaintiff and an action brought by the Attorney General to forfeit the plaintiff's charter and to recover the tax (Complaint, "Sixth," admitted by answers, "Third," R., pp. 4, 5 and 8; Tax Law, Sections 219c, 219e, 219, 199 and 200; all printed in Appendix).

No proceedings to review the tax by *certiorari* can be commenced unless the amount of the tax is deposited and a bond furnished to secure costs (Sec. 219).

Even were the plaintiff successful and the tax held illegal, there is no provision in the Tax Law or elsewhere for refunding the "deposit," and the only reported case on the subject in the State Courts held that the Tax Commission cannot, without legislation, return to a corporation the deposit of an assessment made by it, though same be subsequently declared illegal, as Section 21, Article III, of the State Constitution, forbids it. *Matter of Waterman Co.*, 33 Misc. Rep. (N. Y.) 569.

Thus, the plaintiff's remedy by *certiorari* to the State Courts was not only inadequate, but, as a *practical matter, non-existent.*

In *Dawson* v. *Kentucky Distilleries and Warehouse Co., supra,* it was held that the Federal Courts could not decline jurisdiction of a suit to enjoin the collection of a Kentucky tax which is asserted to be illegal, where, whatever remedies to recover back illegal taxes paid under protest Ky. Stat. Section 162 is now regarded as conferring, the decisions of the highest court left it at least doubtful, when the suit was brought, whether money so paid could be recovered at law by the taxpayer. "It is well settled," said Mr. Justice Brandeis, in the opinion of the Court, at page 296, "that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.' *Davis* v. *Wakelee,* 156 U. S. 680, 688."

Atlantic Coast Line R. Co. v. *Daughton, supra,* decided that this Court could not say that the remedy at law for the recovery of a tax illegally

paid is plain and adequate, so as to prevent maintenance of a bill to enjoin its enforcement, when the remedy depends for its enforcement on a statute which has not been construed and applied by the highest court of the State.

On this point the Court below found in the Gorham case in favor of the plaintiff on the ground that the statute in question compels the taxpayer, before availing himself of any other remedy, to deposit the amount of the tax with the State Comptroller, and there is no provision for getting it back in case the taxpayer succeeds and the tax is cancelled or reduced, citing *In re Waterman, supra,* as "flatly against any recovery."

Judge Learned Hand, in the opinion below, held that "an adequate remedy at law" (by certiorari) "is not clear enough" to prevent equity assuming jurisdiction (274 Fed. 977; R., p. 43). But he denied relief from a tax which he thought improper because the plaintiff had not applied for a rehearing before the Tax Commission, under Section 218, presented to that body the details of its business, as set forth in the record of this case, and demanded a revision, saying:

> "While, therefore, on the facts as stated, the tax both in respect of this and of the munitions business was erroneous, the plaintiff did not choose to avail itself of that process of law which was accorded to it, and therefore was not the victim of any unconstitutional action by the Commission" (274 Fed. 981, R., p. 47).

Thus, while decreeing that in allocating income to New York, the munitions business should have

been separated from the silverware business, he thought that the plaintiff should have sought relief in a review on rehearing before the State Tax Commission.

The provisions of the Tax Law relied on in reaching this conclusion (see opinion, pp. 979-980; R., p. 46) are as follows:

> "Sec. 218. *Revision and readjustment of accounts by tax commission.* If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges *which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account,* the commission shall resettle the same according to law and the facts, and adjust the account for taxes accordingly, and shall send notice of its determination thereon to the corporation and state comptroller forthwith." (Added by L. 1917, Chap. 726, in effect June 4, 1917.) (Italics ours.)

This section plainly authorizes a revision only in accordance with the rules laid down in Section 214. For instance, the tax payer might successfully contest before the Commission the valuation placed on its real property and tangible personal property in or out of the State, on its New York or out-of-state bills and accounts receivable, or the proportion of the capital stock of other corporations owned by it,

allocated by the Commission to New York. It will be noted that the record shows that in several of these items the Tax Commission adopted figures different from those reported by the plaintiff (R., pp. 27, 76, 79). As to these the plaintiff might have attempted a revision under this section, and no complaint is here made in regard thereto. Furthermore, the Tax Commission's improper duplication of accounts receivable, referred to in the opinion below (274 Fed. 981; R., p. 47), could doubtless have been remedied by a resort to that body. For this was an error of the Tax Commission and *contrary* to the legislative enactment as construed by the highest court of the State. But beyond such matters the Tax Commission is powerless. It can revise the data, *but not the formula* for the application thereof in the assessment of the tax.

Reference is also made by the Court below to Section 211, subdivision 7, of the Tax Law, providing that, in addition to the data specifically required to be reported by the corporation, such report shall contain "(7) Such other facts as the Tax Commission may require for the purpose of making the *computation required by this Article.*" (Italics ours.)

This provision simply authorizes the Tax Commission to require more detailed information as to the items *specified* in Section 211, as experience shows that same is necessary to insure certainty and prevent fraud.

These suggestions are equally applicable to Section 213, which provides that the Commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

From the text of the statute it is evident that its express provisions for allocation of income are *mandatory,* and that the Tax Commission is without discretion in determining the proportion thereof to be segregated to New York as the measure of the tax.

Section 214 provides, "If the entire business of such corporation be not transacted within the State, the tax imposed by this article *shall be based* upon a proportion of the net income *to be determined in accordance with the following rules.*" (Italics ours.)

It then precisely prescribes the items which are to enter into the calculation. Section 211 (Reports of Corporations to Tax Commission) requires reports only of those items which are named in Section 214 and "(7) Such other facts as the Tax Commission may require for the purpose of making the computation *required* by this Article." (Italics ours.)

This Court will accept the construction of the statute by the highest Court of New York, and that Court in the *Alpha* case, *supra,* held squarely that only those factors expressly provided in the statute may be used in computing the tax or in apportioning income, and that in this respect the Tax Commission has no discretion. Andrews, J., concurring in result, found that the statute was not objectionable as to the bonds because, as he alone thought, the Tax Commission had sufficient discretionary power to exclude interest therefrom in arriving at the total net income of the taxpayer (230 N. Y., at pp. 66-69). The majority opinion (see *ante,* pp. 23-26), however, held that "no assets not included in the enumerated classes are to enter into the

ratio" (p. 52) and "the exclusion of bonds and stocks is the result of an *explicit mandate*" (p. 58). If the exclusion of stocks and bonds from the ratio was mandatory, so is the exclusion of other income-producing factors (Sec. 214). It does not include bonds. Likewise it does not include cash (Secs. 208, 214) or sales except as represented by bills and accounts receivable.

The Tax Commission could not give the plaintiff any relief upon rehearing as to the matters complained of herein and the predicate of Judge Hand's conclusion was shown to be inaccurate.

In *Davis* v. *Wallace,* 257 U. S. 478, it was held that where the part of a statute expressly providing the ratio to be used in ascertaining the measure of an excise tax for foreign railroad companies had been declared unconstitutional, the taxing officers could not use the ratio prescribed for foreign corporations generally. This Court said (p. 485):

> "From what has been said it follows that to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specifically prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course, we cannot so hold."

In *Meyer, Auditor of Oklahoma,* v. *Wells Fargo & Co.,* 223 U. S., 298, at page 302, this Court said:

> "Neither the Court below nor this Court can reshape the statute simply because it embraces elements that it might have reached

if it had been drawn with a different measure and intent."

See also:

Commonwealth v. *P. Lorillard Co.*, 105 S. E., 683 (Supreme Court of Appeals of Virginia, January 20, 1921).

POINT V.

The tax in the Bass case is unconstitutional as based on an allocation which includes the value of shares of stocks of other corporations to the extent of 10 per centum only of the real and tangible personal property.

People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48.

The plaintiff-in-error reported

"total segregated assets wherever located of..... $3,212,405.
actual value of shares of stocks of other corporations..... 845,195.
a total of..... 4,057,600."

The procedure, upheld below, limited "the value of such shares to ten per centum of the aggregate real and tangible personal property" (Tax Law, Sec. 214, subd. 6), and thereupon "the Commission found

total assets of..... $3,501,483.
assets in New York..... 44,117."

(Opinion below, 232 N. Y., p. 45). (Spacing ours.)

The foregoing provision of Section 214 of the Tax Law, limiting the aggregate value of stocks of other corporations owned by the corporation to 10 per centum of the aggregate real and tangible personal property, had been held unconstitutional in the *Alpha* case above cited; hence, the tax here, in any event, is unconstitutional.

The unconstitutionality and illegality of the tax were fully raised in protests before the Tax Commission prior to the *Alpha* decision (Exhibits D, F, G and I; R., pp. 17, 18, 19, 20 and 21).

POINT VI.

The reasons given in the opinion of the Court of Appeals in the Bass case do not sustain the statute or the tax.

The Court while admitting that the Tax Law made *"the basis of"* the Bass Company's *"taxable net income in New York a portion of its net income earned wholly outside the State"*—acquitted this result of infringement of the Fourteenth Amendment by resort to subjective reasoning. In this respect the Court erred. This concession of an extra-state basis is, of course, the decisive element, as heretofore demonstrated, for the means by which this result is accomplished is immaterial (*International Paper Co.* v. *Mass, supra; Underwood Typewriter Co.* v. *Chamberlain, supra; Wallace* v. *Hines, supra; Shaffer* v. *Carter, supra*).

This applies to all the reasons given by such Court and particularly the interpretation by the Court that the excise is valued on the proportion of its capital employed locally, because the amount

of net income taxable is ascertained by comparison of the local with the total assets (of the classes selected).

The answer is, of course, as made in the *Underwood* case to a similar question of whether the tax was an excise measured by local income or directly upon such income—at page 120:

> "It is contended that the tax violates the Fourteenth Amendment because directly or indirectly it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income, for 'the argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question arising under the Federal Constitution.' *Shaffer* v. *Carter,* 252 U. S. 37."

The conceded result is sought to be eluded by disregarding a prior interpretation of the tax as in effect a property tax—directly on income (*Alpha* case)—and construing it a franchise tax, "on the privilege of doing business in the state." This circumstance has just been shown to be immaterial to the inquiry.

Inherent arbitrariness in the statute is disclaimed because the allocation is asserted to be based "upon a comparison of the total assets with the assets in New York." If the Court implied that all assets of the corporation were included in the allocation, it erred, doubtless inadvertently,

for the allocation does not comprehend *all the assets*—in or out of the State. *Cash* and intangibles (save as stocks and receivables appear) are omitted and cash receipts and total gross earnings are given no consideration. In any event, however, such disclaimer amounts to no more than an assertion that a taxing of foreign income is not inherently arbitrary if accomplished by formula. *Fargo* v. *Hart; Meyer, Auditor of Oklahoma,* v. *Wells, Fargo & Co.; Union Tank Line* v. *Wright; Wallace* v. *Hines,* and the *Alpha* case, *supra,* are to the contrary.

The *Union Tank Line* case tersely disposes of this contention (p. 286) as follows:

> *"Under no formula* can a state tax things wholly beyond its jurisdiction."

The Court below denies an unreasonable result because of what it deems to be the moderate sum (an allocation to New York of income amounting to $27,537.68, and a tax thereon of $826.14) assessed

> "in lieu of all other taxes on personal property, capital stock or income. * * * It would on the contrary seem unreasonable thus to exempt relator from taxation on its large though unprofitable business in this state" (citing the *Underwood* case and *Postal Telegraph Cable Co.* v. *City of Fremont,* 255 U. S. 124, 127; R., pp. 42, 62).

In *Looney* v. *Crane,* 245 U. S. 178, at page 190, Mr. Chief Justice White disposes of the "moderate" feature as follows:

> "It is thus manifest on the face of all of the cases, that they in no way sustain the assumption that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated, was treated as affording a measure of the duty of enforcing the Constitution."

The "in lieu of" circumstance and any alleged inequity of permitting the company to escape taxation although doing what the Court conceives to be a "large though unprofitable business in this State" (the amount was $240,000 in the Bass case) are likewise immaterial to the inquiry. The tax measure is income, and perforce local income—and the fact that there is no such local measure does not justify a judicial substitution of another. Nor does the fact that the Legislature chose to repeal personal property, capital stock or income taxes when it enacted a tax with an income measure permit the judiciary in effect to revive them or some of them or assess a tax based on what it thinks fair if they were revived—when there is a local lack of the income measure.

As said in *Meyer, Auditor of Oklahoma* v. *Wells-Fargo, supra:*

> "Neither the Court below nor this Court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

And in *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, at p. 519:

> "But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose, would have the same ultimate incidence."

And in *Davis* v. *Wallace,* 257 U. S. 478, 485:

> "From what has been said it follows that, to sustain the tax in question, we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specifically prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which railroad companies belong. Of course we cannot so hold."

The cases cited by the Court below do not sustain the contention.

Underwood Typewriter Co. v. *Chamberlain, supra,* has already been treated (*ante,* pp. 18-19, 26-27).

In *Postal Telegraph Cable Co.* v. *City of Fremont,* 255 U. S. 124, the sole question was whether an annual municipal license tax of $60 for the privilege of doing intrastate telegraph business in a city was an imposition upon the interstate commerce business of the company, because the intrastate earnings were said to be insufficient to pay the tax. *No question of due process was presented.*

But even in this limited and dissimilar inquiry the tax was not validated *on account of its meagre-*

ness or, in the language of the Court of Appeals, because it was "moderate."

It was validated for two reasons: First, that the tax had been paid for twelve years without complaint. Second, because (p. 128):

> "* * * any deficit arising from the tax imposed on the interstate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the State Railway Commission, under the provisions of Sec. 7409, for an increase of its intrastate rates * * *. The company, as we have seen, cites Sec. 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement, Sec. 7409 provides a mode of relief, and until it is denied, the company cannot complain under the circumstances presented by this record."

No other cases are cited by the learned Court below, and, as we have shown, a long line of authorities of this Court have held that an arbitrary statute, taxing property beyond the jurisdiction of the taxing State, however ingenious its method, and without respect to the amount involved in a particular case, is void as wanting in due process and as a burden upon interstate and foreign commerce.

POINT VII.

The Corporation Tax Law of New York is unconstitutional upon the grounds specified so that in the Bass case the final judgment affirming the determination of the New York State Tax Commission should be reversed; and in the Gorham case the final decree dismissing the complaint upon the merits should be reversed in order that the tax in question may be adjudged void and cancelled of record and the defendants enjoined from its collection.

Dated, New York, March 18, 1924.

Respectfully submitted,

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HAROLD T. EDWARDS,
Counsel for Plaintiff-in-Error and Appellant.

APPENDIX.

Assignment of Errors

Bass Case.

(Record, pp. 58-60).

First: The Court of Appeals of the State of New York and the Appellate Division of the Third Department erred in affirming the determination of the State Tax Commission and in refusing to vacate the tax imposed against the above-named Bass, Ratcliff & Gretton, Limited, on the ground that the said tax and law under which it was assessed are unconstitutional as in violation of Section 2 of Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States (Points I to VI, except IV, *supra,* pp. 18-40, 48-54).

Second: The Court erred in not adjudging said tax and the Corporation Tax Law of the State of New York under which it was assessed and imposed against the above-named Bass, Ratcliff & Gretton, Limited, unconstitutional as in violation of Section 2 of Article 4 and the Fourteenth Amendment, and Section 8 of Article 1 of the Constitution of the United States, upon the following grounds:

(a) It taxes a large part of the plaintiff-in-error's net income earned in its business and received by it wholly without the State of New York, and taxes a large amount of its property located without the States of New York (Points I, II and VI, *supra,* pp. 18-39, 49-54).

(b) It taxes a proportionate amount of the net income of a foreign corporation determined by an arbitrary and set rule prescribed in said statute and having no relation to the actual net income of such corporation actually earned in the State of New York, nor the value of the income producing property in the State of New York, and thereby the plaintiff-in-error is unjustly taxed upon a large amount of its net income, all of which so taxed was earned and received wholly in foreign countries (Points I, II and VI, *supra,* pp. 18-39, 49-54).

(c) It directly burdens and lays a tax upon interstate commerce (Point III, *supra,* pp. 39-40).

Third: The Court erred in not holding that the said tax, even though considered as a franchise tax, is unconstitutional as being based upon property and income therefrom without the State of New York (Points I, II and VI, *supra,* pp. 18-39, 49-54).

Fourth: The Court erred in holding that such tax is constitutional, although it is based on an allocation which includes the value of shares of stocks of other corporations owned by Bass, Ratcliff & Gretton, Limited, the plaintiff-in-error, to the extent only of ten (10%) per cent of its tangible real and personal property (Point V, *supra,* pp. 48-49).

Assignment of Errors

Gorham Case.

(Record, pp. 49-51).

1. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint herein upon the merits by the decree entered the 12th day of August, 1921 (Points I to IV, *supra,* pp. 18-48).

2. That said Court erred in not adjudging the corporation tax assessed by the State of New York against the plaintiff as described in the amended complaint void and ordering its cancellation of record and in not restraining the defendants from collecting the same (Points I to IV, *supra,* pp. 18-48).

3. That said Court erred in not adjudging said tax and the Corporation Tax Law of the State of New York under which it was assessed and imposed against the plaintiff unconstitutional and in violation of Section 2 of Article IV and the Fourteenth Amendment and Section 8 of Article I of the Constitution of the United States upon the following grounds:

a. It taxes a large part of the plaintiff's net income earned in its business and received by it wholly without the State of New York, and taxes a large amount of its property located without the State of New York (Points I and II, *supra,* pp. 18-39).

b. It taxes a proportionate amount of the net income of a foreign corporation determined by an arbitrary and set rule prescribed in said statute and having no relation to the actual net income of such corporation actually earned in the State of New York, nor the value of the income-producing property in the State of New York, and thereby the plaintiff is unjustly taxed upon a very much larger share of its net income than was earned in the State of New York (Points I and II, *supra,* pp. 18-39).

* * * * * * *

h. It directly burdens and lays a tax upon commerce between the different States (Point III, *supra,* pp. 39-40).

CORPORATION TAX LAW OF NEW YORK.

Sections Applicable with 1918 Amendments.

ARTICLE 9-A OF THE TAX LAW OF THE STATE OF NEW YORK, CHAPTER 60 OF THE CONSOLIDATED LAWS OF NEW YORK. SAID ARTICLE 9-A ADDED THERETO BY LAWS 1917, CHAPTER 726.

FRANCHISE TAX ON MANUFACTURING AND MERCANTILE CORPORATIONS.

Section 208. DEFINITIONS. As used in this article, 1. The term "corporation" includes a joint-stock company or association.

2. The words "tangible personal property" shall be taken to mean corporeal personal property, such

as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt;

3. The term "manufacturing corporation" means a corporation principally engaged in the business of manufacturing tangible personal property for itself or for others;

4. The term "mercantile corporation" means a corporation principally engaged in the business of buying or selling tangible personal property for itself or for others.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 209. FRANCHISE TAX ON CORPORATIONS BASED ON NET INCOME. For the privilege of exercising its franchises in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state every foreign manufacturing and every foreign mercantile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 211. REPORTS OF CORPORATIONS TO TAX COMMISSION. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first transmit to the tax commission a report in the form prescribed by the tax commission specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the kind of business transacted.

2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within the state, (b) tangible personal property manufactured or shipped from within the state and (c) services performed within the state, and the average monthly total value for the fiscal or calendar year of bills and accounts receivable for (a) tangible personal property sold from its stores or stocks within and without the state, (b) tangible personal property manufactured or shipped

from within the state and other states and countries, and (c) services performed both within and without the state.

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corporations within the state of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the state, the city, village or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making the computation required by this article.

8. Any corporation taxable hereunder may omit from its report the statement required by subdivisions three to seven, both inclusive, by incorporating in its report a consent to be taxed upon its entire net income.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 214. (Printed in Brief, *supra*, pp. 8-9.)

Section 215. RATE OF TAX. The tax imposed by this article shall be at the rate of three per centum of the net income of the corporation or

portion thereof taxable within the state, determined as provided by this article.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 218. REVISION AND READJUSTMENT OF ACCOUNTS BY TAX COMMISSION. If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, the commission shall resettle the same according to law and the facts, and adjust the account for taxes accordingly, and shall send notice of its determination thereon to the corporation and state comptroller forthwith.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219. REVIEW OF DETERMINATION OF TAX COMMISSION BY CERTIORARI. The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed in this article, may be reviewed in the manner prescribed by and subject to the provisions of sections one hundred and ninety-nine and two hundred of this chapter.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 199. REVIEW OF DETERMINATION OF TAX COMMISSION BY CERTIORARI. The determination of the commission upon any application made to it by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the commission shall return, on such certiorari, the accounts and all the evidence before it on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

(Thus amended by L. 1915, chap. 317, in effect April 15, 1915.)

Sec. 200. REGULATIONS AS TO SUCH WRIT OF CERTIORARI. No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percent-

age, interest and other charges audited and stated in such account must be deposited with the state treasurer before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals.

(Thus amended by L. 1915, chap. 317, in effect April 15, 1915.)

Sec. 219-c. WHEN TAX PAYABLE. The tax hereby imposed shall be paid to the state comptroller on or before the first day of January of each year. If such tax be not paid on or before January first, or in the case of additional taxes, within thirty days after the bill for such additional tax has been rendered, the corporation liable to such tax shall pay to the state comptroller, in addition to the amount of such tax, ten per centum of such amount, plus one per centum for each month the tax remains unpaid. Each such tax shall be a lien upon and binding upon the real and personal property of the corporation liable to pay the same from the time when it is payable until the same is paid in full.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-d. CORRECTIONS AND CHANGES. If the amount of the annual net income of any corporation taxable under this article as returned to the

United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation ,within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income. The tax commission shall compute the taxes which, in view of such change or correction, would be due from such corporation for the fiscal or calendar year for which such change or correction is made. If from such computation it appears that such corporation shall have paid under this article an excess of tax for the year for which such computation is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. If from such computation it appear that an additional tax is due from such corporation for such fiscal or calendar year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-e. WARRANT FOR THE COLLECTION OF TAXES. If the tax imposed by this article be not paid within thirty days after the same becomes due, unless an appeal or other proceeding shall have been taken to review the same, the comptroller may issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the corporation owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the corporation against whom it is issued from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Sec. 219-f. ACTION FOR RECOVERY OF TAXES: FORFEITURE OF CHARTER BY DELINQUENT CORPORATIONS. Action may be brought at any time by the attorney-general at the instance of the comptroller, in the name of the state, to recover the amount of any

taxes, penalties and interest due under this article. If such taxes be not paid within one year after the same be due, and the comptroller is satisfied that the failure to pay the same is intentional he shall so report to the attorney-general, who shall immediately bring an action in the name of the people of the state, for the forfeiture of the charter or franchise of any corporation failing to make such payment, and if it be found that such failure was intentional, judgment shall be rendered in each action for the forfeiture of such charter and for its dissolution if a domestic corporation and if a foreign corporation for the annulment of its franchise to do business in this state.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

Section 219-j. MANUFACTURING AND MERCANTILE CORPORATIONS EXEMPT FROM PERSONAL PROPERTY TAX AND FROM THE PROVISIONS OF SECTIONS TWELVE, TWENTY-SEVEN, ONE HUNDRED AND EIGHTY-TWO AND ONE HUNDRED AND NINETY-TWO OF THE TAX LAW. After this article takes effect manufacturing and mercantile corporations shall not be assessed on any personal property which for the purpose of this exemption shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting. After this article takes effect manufacturing and mercantile

corporations shall not be assessed or taxed upon their capital stock as provided for in section twelve of this chapter, nor shall they be required to pay the franchise tax imposed by section one hundred and eighty-two of this chapter, nor to make the reports called for in sections twenty-seven and one hundred and ninety-two of this chapter. Nothing herein shall be construed to impair the obligation to pay franchise taxes due on or before the fifteenth day of January, nineteen hundred and seventeen, or taxes on personal property or capital stock assessed in the year nineteen hundred and sixteen or in the year nineteen hundred and seventeen before this article takes effect, whether payable in that year or not. But if any manufacturing or mercantile corporation shall pay taxes on personal property or capital stock assessed in any tax district in the year nineteen hundred and seventeen, such corporation shall be entitled to credit for the amount of such taxes so paid on its account for taxes first assessed against it under this article by the tax commission, not exceeding, however, the amount of such first assessment.

(Added by L. 1917, chap. 726, in effect June 4, 1917.)

AMENDMENTS OF 1918, CHAPTERS 271, 276 AND 417 TO THE FOREGOING SECTIONS.

Section 208, subdivisions 3 and 4, defining "manufacturing corporations" and "mercantile corporations" are omitted by the amendment Laws of 1918, Chapter 417.

Section 209. (Printed in Brief, *supra,* pp. 7-8.)

NOTE: Chapter 276 of the Laws of 1918, amending the above Section 209, contains this provision:

> "Sec. 5. The sections of such chapter amended by this act shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen."

Section 211. REPORTS OF CORPORATIONS TO TAX COMMISSION. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of net income to the United States treasury department for any fiscal or calendar year, transmit to the tax commission a report in the form prescribed by the tax commission specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted.

2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department, and if the corporation shall claim that such return is inaccurate, the amount claimed by it to be the net income for such period.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of

a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed, based on all orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation within this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without the state; (b) personal property sold by the corporation from merchandise owned by it at the time of the acceptance of the order but not manufactured by it; and (c) services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the reporting company. In case of a corporation organized under the laws of another country a statement shall be made showing its entire net income.

6. If the corporation has no real or tangible personal property within the state, the city, village

or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making the computation required by this article.

8. Any corporation taxable hereunder may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 417, in effect May 1, 1918.)

Section 214. COMPUTATION OF TAX. If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States treasury department, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission.

If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such ascertained net income, to be determined in accordance with the following rules:

The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state,

2. The average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this state,

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, but not exceeding ten per centum of the real and tangible personal property segregated to this state under this article, bears to the aggregate of

4. The average monthly value of all the real property and personal property of the corporation, wherever located,

5. The average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without this state; (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it; and (c) services performed both within and without this state, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation,

6. The average total value of stocks of other corporations owned by the corporation, but not exceeding ten per centum of the aggregate real and tangible personal property set up in this report.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this state and every foreign corporation doing buisness in this state, other than those exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of not less than ten dollars and not less than one mill upon each dollar of the apportionment of the face value of its issued capital stock apportioned to this state, which shall be determined by dividing the amount of the real and tangible personal property in this state by the entire amount of the real and tangible personal property as shown in the report, and multiplying the quotient by the face value of the issued capital stock. If such a corporation has stock without par value, then the base of the tax shall be on such a portion of its paid in capital as its real and tangible personal property in this state bears to its entire real and tangible personal property.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chaps. 276, 417, in effect May 1, 1918.)

NOTE: Chapter 276 of the Laws of 1918 amended the above Section 214, and such Act contains the retroactive provision quoted, *supra*, under Section 209. This Section 214 was, however, again amended in 1918 by Chapter 417 of the Laws of 1918, which re-enacts the whole section with numerous amendments to its phraseology and repeats so much of the amendments in Chapter 276 as remained unchanged. This second amendment to this Section 214, contained in Chapter 417, has no retroactive provision.

Sections 215, 218, 219-e and 219-f. (Not amended in 1918.)

Section 219 was amended by Laws of 1918, chapter 417, so as to incorporate Section 200, and substituting the words "State Comptroller" for "State Treasurer."

Section 219-c was amended by Laws of 1918, chapter 271. The amendments are not material to the issues herein involved.

Section 219-d. CORRECTIONS AND CHANGES. If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the posses-

sion of the commission, the net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of section one hundred and ninety-five of this chapter is hereby granted to it in respect to the ascertainment of such net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the tax commission. The proceedings and determination of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally

been allowed in favor of such assignee. If from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission pay such additional tax.

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 276, in effect April 19, 1918.)

Note: L. 1918, ch. 276, Sec. 5. The sections of such chapter amended by this act shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen.

Section 219-j. EXEMPTIONS FROM CERTAIN OTHER TAXATION. After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for the fiscal year ending December thirty-first, nineteen hundred and seventeen, in taxing districts in which the fiscal year is coterminous with the calendar year; and where taxes are required by law to be levied for local purposes for a fiscal year beginning in nineteen hundred and seventeen and ending in nineteen hundred and eighteen, such corporations shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for such fiscal year. * * *

(Added by L. 1917, chap. 726; thus amended by L. 1918, chap. 271, in effect April 19, 1918.)

THE NEW YORK TAX CASES

Supreme Court of the United States

OCTOBER TERM, 1923.

BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error, against STATE TAX COMMISSION, Defendant-in-Error.	No. 24.
GORHAM MANUFACTURING COMPANY, Appellant, against STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York, Appellees.	No. 14.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR AND APPELLANT.

Separate briefs have been filed by the State Tax Commission in these cases.

THE GORHAM CASE.

I.

The appellees' argument in the Gorham case is as follows:

Point I is that the plan of taxation is an equitable one and constitutional on its face.

This is so if it is equitable and constitutional to tax five times the net income actually earned in New York, as in the Gorham case, or income earned wholly in foreign countries where there is no net income in New York, as in the Bass case. Their brief fails to show that the statute effects an approximate separation of state-earned income or that the tax when computed upon income earned without the State is constitutional.

Point II is that the plaintiff fails to show that the formula works inequity against it.

This point is not present in the Bass case, for the income there upon which the tax was measured was wholly foreign.

Point III is that a remedy existed before the Tax Commission.

That effort proved unavailing when tried in the Bass case; so this point is also not in the Bass case.

Point IV is that all the facts must be shown to the assessors.

This was done in the Bass case with the result that the mandatory provisions of the statute were of necessity applied and income earned entirely in foreign countries taxed. The facts of actual sales

within and without the State and actual net profits in and out are rendered immaterial and irrelevant by the statute. Equity does not require the doing of a vain act.

The argument of the appellees (Point I) is predicated upon their construction of the *Underwood* case. In Point II of our main brief (pp. 28-39) many reasons are given in the five subdivisions there why the New York Tax Law is inherently arbitrary. Prominent among these is the fact that, contrary to the Federal method, the State allocates the entire net income of the corporation rather than that arising from business in or partially in the State. Any allocation involves the errors inherent in an approximation; the Federal Government, recognizing this, limits the allocation—the State, on the contrary, magnifies the error by multiplying the allocating percentage by the total net income. Yet it is undisputed that a more correct result is obtained by the Federal method, as is evidenced by the Bass case. The argument of convenience cannot sustain the State method of disregarding reality; for the Federal method is in practice applied to much larger and more complicated business operations. We refer to our Point II as elaborating the many other reasons why this statute is inherently arbitrary.

The appellees' brief rests the argument on the law on the *Underwood* case, treating it as an affirmative and final determination of the constitutionality of taxes upon an apportionment of income to the State by a system of allocation of tangibles within and without the State, and claiming to read in the opinion there an answer to all arguments that the New York law is inherently arbitrary or has produced an unjust result.

In the *Underwood* case, however, the Court expressly reserved the question of the constitutionality of other taxes assessed under the Connecticut statute, saying (254 U. S. 113, 121):

> "We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution."

The main challenge of the appellees' is that the Gorham Company has failed to sustain its burden of showing a taxation of income earned extra-state, by not showing the actual income earned in New York.

We repeat that *in the Bass case no such failure of proof is claimed as it is conceded that no net income was earned in New York or, in fact, in the United States. The taxing of income earned without the State is there undisputed.*

But there is no such failure of proof in the Gorham case. We need go no further than the undisputed facts to determine the limits of the net income earned in New York.

It is undisputed that the New York sales were 10½ per cent. of total sales and the entire net income, $2,089,059.64. 10½ per cent. of this net income is $219,351.26, and this is the limit of New York net income unless a greater profit were realized on such sales. The uncontroverted proof is, however, that no greater profit was realized on such sales in New York and the entire business was the sale of its own products manufactured in Rhode Island (R., pp. 22-24). Because of these two facts gross sales are in this case a fair guide to net profits.

This figure of net profit from New York sales is about $39,000 more than the figures in our main brief because it disregards the fact that profits from munitions sold wholly outside New York were greater than on silverware. It is this relative rate of profit between these two products that the appellees' brief attempts to controvert. But the result is immaterial. Attributing one-half the profit to manufacture in Rhode Island gives a figure of $110,000 of net profit in New York as against our more exact computation of $90,000. These figures are to be compared with $452,752 of net income actually taxed. In any event, therefore, the result of the appellees' attack upon our proofs is at best but a reduction of the actual tax from a tax upon *five times* the income actually earned in New York to a tax upon *four times* such income.

The statement of facts in our main brief (pp. 12-17) shows the soundness of our calculations, *all based as they were upon the proofs there referred to.* A direct confirmation of the munitions income is found in the affidavit of John S. Holbrook, vice-president (Exhibit 25, pp. 119-122).

II.

Some assertions in the Gorham brief require comment:

Much confusion of the facts is to be found in the appellees' brief at page 26. It is stated that "plaintiff really made no selling efforts at all in the State of Rhode Island where the goods were

manufactured." The record, however, shows that munitions (58 per cent. of total sales) were all made and sold in Rhode Island and that 89½ per cent. of all sales were outside the State of New York (Statement of Facts, Appellant's Brief, p. 15). The reference to inactive stocks in New York (Appellees' Brief, pp. 26, 27) implies, as it is worded, that all such stocks were inactive. This was not so as appears from the record, pages 24, 29, 30.

Again, the appelees' brief (p. 27) states that the general practice was to fill an order from New York stock and have the balance shipped from Providence. This was not the general practice as New York sales were only 10½ per cent. of total sales, and the goods shipped from Providence on prior orders from New York were only $382,221.62 out of nearly $12,000,000 total sales (Appellant's Brief, p. 15).

The appellees' brief (p. 37) asserts that the objection that property outside the State was taxed was not presented until after the decision of the *Alpha* and *Underwood* cases. Again (at p. 8), it is stated that the amendment to the bill *nunc pro tunc* was for the purpose of presenting this objection. These statements are erroneous as the original bill of complaint alleged such objection and the amended complaint elaborates it. The amendment to the complaint by stipulation was "with the same force and effect as if originally included therein," so this discussion is academic (R., pp. 21-22).

III.

Cases cited in the appellees' brief, Point IV, relating to the presentation of facts to the assessors *for the valuation of the entire capital stock of a corporation,* do not relate to the constitutional question here involved. If complaint were made as to the value of any of the assets found by the Commission for the purpose of the allocation, such facts should, of course, be presented to the Commission. Here, however, the operation of the statute is a matter of arithmetic not involving any judicial process, the result of such computation being in effect to tax property without the State. The percentage of the selected assets within the State to those everywhere is computed and that percentage applied to the net income returned to the United States Treasury Department (Sec. 214). Thus no facts concerning where such income is actually earned have any relation to the calculation made by the Commission (see Appellant's Main Brief, Point IV, pp. 41-48). As we have there shown, the decision in the *Alpha* case is binding as to the construction of the statute on this point (see Our Main Brief, pp. 46, 47).

In *Commonwealth* v. *P. Lorillard Co.,* 105 S. E. 683, Virginia Supreme Court of Appeals, January 20, 1921, the reasoning of the opinion is in point. Burks, J., says at page 685:

> "The plaintiff in error is a foreign corporation doing business in Virginia, and a number of other states, and also in foreign countries. It pays a license tax here for doing business in this state, and also a prop-

erty tax on its property located in this state. It has its principal office in the State of New Jersey, where it was incorporated, and derives its income from business done in all the states of the Union and in foreign countries. It would seem plain that the State of Virginia cannot impose an income tax on income derived from business done outside of the state, and this was practically conceded on the argument; but counsel for the state seem to think that the difficulty can be avoided, and the statute be upheld, by allowing the administrative officers to adopt their own methods of ascertaining what amount of income was derived from business done in Virginia, and extending the tax thereon at the rate fixed by the statute. This would be legislation and not administration. Administrative officers have no such power."

See also:

Meyer, Auditor of Oklahoma, v. *Wells Fargo & Co.*, 223 U. S. 298, 302.
Davis v. *Wallace*, 257 U. S. 478, 485.

THE BASS CASE.

IV.

The brief in the Bass case for the defendant-in-error deals with a conceded lack of any net income whatever in the State and a consequent apportionment of net income earned wholly in foreign countries. It seeks to escape the consequences of such a resort to a foreign measure for a State tax, in effect taxing income without the State, by reasoning that there were some taxable assets in the State

and a tax could have been imposed thereon. Therefore, in the absence of such a lawful tax, the tax imposed by the statute may be taken as a substitute. Point VI of our main brief (pp. 49-54) answers these contentions.

None of the cases cited support such conclusion.

In *Shaffer* v. *Carter*, 252 U. S. 37, cited by defendant-in-error, Mr. Justice Pitney says, at page 52:

> "And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents *from their property or business within the state, or their occupations carried on therein;* enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders." (Italics ours.)

This is far short of saying that net income of a foreign corporation which does *not* accrue to it from its property or business within the State or its occupation carried on therein can be constitutionally taxed. Yet that is what has been done in the cases at bar.

In *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, also cited, it was held that a State in levying a general income tax upon the gains and profits of a *domestic* corporation may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal Con-

stitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. No question of due process was involved.

That case does not reach the cases at bar, where a substantial part of the net income of a foreign corporation, produced largely from interstate or foreign commerce, *earned and received outside the State,* is taxed by the State of New York.

Maxwell v. *Bugbee,* 250 U. S. 525, is a case of inheritance taxes and manifestly to be distinguished from taxation of foreign corporations.

Other cases holding that excise taxes based in one form or another on capital stock were valid must be read in the light of *International Paper Co.* v. *Mass.,* 246 U. S. 135, and other recent cases cited in Point I of appellant's brief, where excise taxes based upon the entire capital stock of a foreign corporation were held invalid (see also other cases distinguished in our said Point VI).

V.

The brief in the Bass case for the defendant-in-error, Point II, attempts to show that the corporation had over $500,000 of assets in New York and that a direct tax thereon would probably equal the tax assessed. This is speculative for the statute expressly exempts the personal property from such tax and that fact is no justification for re-establishing such a tax in a particular case by judicial construction.

But no such assets existed at any time in New York. The sales of Bass ale were about $240,000

for the year and the monthly average of bills and accounts receivable therefrom was $20,449.29, showing approximately a monthly turnover. The monthly average of tangible personalty was $23,668.33, but this was with minor exceptions Bass ale which was sold each month resulting in the bills and accounts receivable of about the same monthly average. So at no time was there any substantially greater personal property on hand than the monthly averages. The figure of personal property fixed in this brief at twelve times its monthly average thus has no foundation in fact. It is flatly contradicted by the testimony (R., p. 34) stating that the company had tangible personal property in the City of New York of between $23,000 and $24,000, including furniture and fixtures and bills and accounts receivable of about $20,450.

Furthermore, the tangible personal property and the bills and accounts receivable cannot be added together to show assets because the personal property is replaced on its sale by bills and accounts receivable therefor, so both assets cannot exist at the same time.

The true value of the assets thus at any tax date for the taxation of personal property would be little more than the monthly average or less than one-tenth of that asserted in the brief for the defendant-in-error. The whole argument of a reasonable tax on personal property, therefore, fails, even were any such speculation permissible.

VI.

The defendant-in-error claims in Point III of its brief, that the plaintiff-in-error had not raised the point that the tax was illegal in that the allocation excluded stocks owned above 10 per cent of its tangibles. The unconstitutionality and illegality of the tax was fully raised in protests made before the Tax Commission prior to the *Alpha* decision (Exhibit D, R., p. 17; Exhibit F, R., pp. 18, 19; Exhibit G, R., p. 19; Exhibit I, R., pp. 20, 21). These protests, having broadly covered all grounds, surely raise questions of partial illegality.

This claim made by the defendant-in-error is no answer in the face of the declaration of the unconstitutionality of the law in this respect by the Court of Appeals of New York (see Plaintiff-in-Error's Main Brief, Point V, pp. 48, 49).

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1923.

No. [redacted]10

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff in Error.

against

STATE TAX COMMISSION,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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POINTS OF ARGUMENT.

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 24.

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff in Error,
against
STATE TAX COMMISSION,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in this case, represented by the same attorneys as appear in No. 14 on the present calendar, *Gorham Manufacturing Company v. State Tax Commission,* has followed the procedure by certiorari through the courts of New York State rather than the Federal equity suit chosen in the Gorham case. The tax is the same kind of a tax as involved in the Gorham suit, namely, the annual franchise tax on business corporations computed on a proportion of entire net income, the company doing business both within and without the State of New York.

Very much the same objections are raised against the tax as in the Gorham case, the more important being that the statute taxes property beyond the jurisdiction of the State government.

The plaintiff's business was the sale of Bass ale. It was organized under the Laws of Great Britain and had a certificate to do business in New York State, and actually did business in New York during the tax year reviewed here, November 1, 1918 to November 1, 1919. Its claim was, that as it reported to the United States Treasury Department no net income earned in the United States for its fiscal year June 30, 1917 to June 30, 1918, it need not pay a tax to New York for the privilege of doing business here, because it says our tax is computed on the net income returned to the United States, and there was no such income reported.

Plaintiff argued in the state courts (1) that the New York statute did not intend to lay a tax where the net income of a corporation, looking only to its profitable operations, all arises from business conducted in a foreign country, and (2) that if it did, the statute is unconstitutional.

The state courts have settled that the "entire net income" of a corporation under our statute, a part of which is set off by formula to New York, does comprehend all the net income of a corporation regardless of where it is received, in the United States, or elsewhere. Indeed, the statute itself provides:

> "Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income as though organized under the laws of this State." (Sec. 211).

There remains for the plaintiff in this court the same argument as in the Gorham case that the New York formula which apportions the total net income of a corporation, wherever received, on the basis of segregated assets, affects the taxation of the relator's property outside the State of New York.

Exhibit C (page 14, Record) shows the relator's "entire net income" wherever earned for the fiscal year ending June 30, 1918, was $2,185,600 (fol. 28) and that during that year it had average monthly sales in New York State of $20,449.29, representing total sales in New York for the year of about $240,000 (fols. 30, 61). These were sales of Bass ale, the average monthly value of such stock of ales being $23,668.33 (fol. 60). The business, of course, due to oncoming prohibition was small compared to previous business, but the franchise was exercised in that year, and sales were made after the first of November, 1918 (fol. 62). Between June 30, 1918 and some date following the first of November, 1918 it disposed of over $284,000 of ales left in New York City (fols. 46, 59, 60). So the franchise was also exercised for the tax year here under review, November 1, 1918, to November 1, 1919. Bear in mind

that the tax under Article 9-A is paid in advance but based on the previous fiscal year's business (Sec. 209, Tax Law).

The relator's argument amounts to this, that admitting it sold goods here in the base year and in the tax year, simply because the transactions in the United States did not show a profit, the State cannot as much as *measure* the *franchise* tax by formally allocating for the purposes of the tax a portion of the corporation's income to New York upon the basis of capital employed here and business done here.

The Appellate Division and the Court of Appeals (with an opinion) affirmed the tax as assessed by the Tax Commission (fols. 66, 75, 81; 198 A. D. 963; 232 N. Y. 42).

The formula for the franchise tax is as follows:

> Sec. 214. *Computation of tax.* If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as defined in section two hundred and eight of this chapter subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire

net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within the state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, but not exceeding ten per centum of the real and tangible personal property segregated to this state under this article, bears to the aggregate of

4. The average monthly value of all the real property and personal property of the corporation, wherever located.

5. The average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without this state; (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it; and (c) services performed both within and without this state, based on orders received at offices maintained by the

corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.

6. The average total value of stocks of other corporations owned by the corporation, but not exceeding ten per centum of the aggregate real and tangible personal property set up in this report.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock."

What is the base of this tax?

The law provides (1) that you shall first determine the entire net income;

(2) that you shall segregate certain assets to New York State and find what per cent of the whole segregated assets is located in New York State;

(3) that you shall take such a per cent of the entire net income as the assets segregated to New York bear to the entire segregated assets. The result of this procedure is the base of the tax to which to apply the rate provided by law.

Neither the property alone nor the net income alone constitutes the base.

The tax, both in law and in fact, is neither a tax upon income nor upon property.

$$\frac{\text{Assets segregated to N. Y.}}{\text{Total assets}} \times \text{Entire Net Income} = \text{Base of Tax}$$

The base is a combination of capital investment (real and tangible personal property and bills and accounts receivable), sales (bills and accounts receivable and average monthly values of tangible personal property), investment of surplus (stocks) and income.

Plaintiff says that it is obvious that a state which uses net income as one of the factors of the tax base is taxing property beyond its borders and jurisdiction, when no net income is produced on the transactions within the State. We answer, that whether a state statute as a legal proposition taxes *property outside* does not depend upon the fact that there is or is not net income from business in the State, that is to say, the proposition is not settled by observing that no net income arises here and concluding immediately that no *franchise* tax can be assessed here. Net income along with the other factors (capital invested and business done) constitute the measure of the *franchise* tax selected for convenience only. "The selected

measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority" (*Kansas City Railway v. Kansas* 240 U. S. 227 233). It all goes back to the operation of the formula, whether the formula produces a tax which is inequitably enhanced by consideration of property beyond state jurisdiction. Mere collection of the net income abroad is not the answer.

POINT I.

THE STATE IS TAXING A PRIVILEGE TO CARRY ON A BUSINESS WITHIN ITS BORDERS. IT IS NOT A TAX ON INCOME, BUT TOTAL NET INCOME OF THE CORPORATION IS APPORTIONED UPON THE BASIS OF CAPITAL INVESTED HERE AND BUSINESS CARRIED ON HERE, AND SUCH APPORTIONED NET INCOME IS USED AS A MEASURE OF THE VALUE OF THE FRANCHISE.

A very distinguishing feature between an income tax and our franchise tax under Article 9-A is that an income tax is laid directly upon income and is levied for the year in which the income is received (See State Tax on Personal Incomes, Sections 350, 351, 351-a, 376; and Federal Income Taxes). The state franchise tax on corporations is for the privilege of conducting business within

the State for the coming year valued on business done the year previous.

Article 9-A is a substitute for the old franchise tax under Section 182 of the Tax Law which was based upon dividends declared and capital stock valuations. Article 9-A is honestly called by its title "Franchise Tax on Manufacturing and Mercantile Corporations", and is laid upon a domestic corporation, "for the privilege of exercising its franchise in this state in a corporate or organized capacity," and is imposed upon foreign corporations "for the privilege of doing business in this state" (Sec. 209). The title to Section 209 proclaims the tax to be a franchise tax based on income: "Sec. 209. Franchise Tax on Corporations *based* on Net Income."

In *People ex rel. Barcalo Manufacturing Co. v. Knapp*, 187 A. D. 89, 93, 227 N. Y. 64, and in this cause now upon argument here (*People ex rel. Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 232 N .Y. 42, 46; Record, fol. 42) the state courts have held, and this court has also held (*Peo. of State v. Jersawit as trustee of Ajax Dress Co.*, decided Jan . 7/24), that the tax in its true nature is a tax for the privilege of carrying on business. Such a tax can be measured in any fashion the State desires (*Home Insurance Co. v. New York*, 134 U. S. 594; *Kansas City Railway v. Kansas*, 240 U. S. 227, 232; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 163, 165; *Cadwalader v. Leder-*

er, 273 Fed. 879, 880) but the plan of course must stand the test of constitutionality with regard to the result it works.

Even assuming the tax were an income tax upon corporations, if the method of taking part of entire net income produces no heavier burden than a tax upon the conduct of the business in New York measured in another way, then the statute, this court has told us, is a fair and equitable one (*Shaffer v. Carter*, 252 U. S. 37, 55; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113):

> "The practical burden of a tax imposed upon the net income derived by a non-resident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen." (*Shaffer v. Carter*, 252 U. S. 37, 55.)

New York is endeavoring to arrive at the value of the local business privilege. The State has lawful power to tax the business or the privilege of conducting it.

Under the New York statute all of relator's real and tangible personal property in foreign countries, its bills and accounts receivable and corporate stocks owned in foreign countries have been assigned outside the State and operate to lessen the New York tax, and while it seems startling to the relator that property across the seas is

brought into consideration, the proposition is no different than the bringing in within the formula of property in Pennsylvania, Illinois or elsewhere outside the State of New York (*Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113; *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321; *Gorham Manufacutring Co v. Tax Commission*, 274 Fed. 975).

The relator does not attempt to show that the tax works injuriously against it upon facts with relation to its entire business and property. It relies abstractly in its attack upon the fact that property *in foreign countries* enters the computation.

We are taxing business or more accurately a privilege to conduct business, and the statute operates both in its plan and in its enforcement against the corporation's property in this state used in that business. Relator had personal property in New York (capital invested) represented by its stock of ales of the average monthly value of $23,668.33 and had sales here (bills and accounts receivable) of the average monthly value of $20,449.29 (fols. 61, 62). This business was beyond all doubt taxable by New York. The New York statute compares the capital invested in New York and the business activity here with the whole investment and business of the corporation. The fact that the resulting percentage is applied to net income does not change the basic nature of the

inquiry and the measure, *i. e.*, what part of entire business is conducted in New York.

The business in New York was done on thirty days credit (fol. 60) and the receipts from that business were sent to London. The receipts went into gross earnings of the corporation from which after the deduction of expenses net income was derived. Surely the receipt from sales in New York went into the gross earnings of the corporation and helped produce net income.

Business here and abroad was conducted as one unit, the ale was made there and sold here, and the result of the formula for the year in question is but to "throw the burden of the tax upon the going concern as a whole and not on the local branch" as Judge Pound said in the opinion of the Court of Appeals (fol. 77). It was all one business conducted along the same lines everywhere, the manufacture in England and the sale in England, New York and other places of the same manufactured product. (*Wallace v. Hines*, 253 U. S. 66).

In *Postal Telegraph-Cable Co. v. Fremont*, 225 U. S. 124, 127, a license tax imposed by a city on a telegraph company doing both a local and an interstate business, was perforce met by receipts from interstate commerce because the revenue derived from the local business as a whole was in-

sufficient to pay the tax. The tax was nevertheless sustained. "The simple assertion of a loss" does not characterize the tax as an attempt to reach property outside the State.

The Corporation is not compelled to do a local business in New York, and if the tax must be met by receipts from business elsewhere, the local business being unprofitable, it may discontinue its local business (*Pullman Co. v. Adams,* 189 U. S. 420; *Williams v. Talladega,* 226 U. S. 404, 416, 417; *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S. 252, 258).

In conclusion of all discussion, the same judicial inquiry presents itself as in the *Gorham case,* "Does the statute fall within that class where there has been an *exercise in good faith* of the legitimate taxing power?" "We are to look for a practical rather than a logical or philosophical distinction" (*United States Express Co. v. Minnesota,* 223 U. S. 335, 345, 348).

This is a privilege tax (not a property tax) which undoubtedly the State may impose, and appellant's argument seems an effort "to distort the statute from its purpose to tax the privilege, which the statute has created into a property tax, and is unwarranted by any purpose or effect of the enactment" (*Maxwell v. Bugbee,* 250 U. S. 525, 539; *Kansas City R. R. Co. v. Kansas,* 240 U. S. 227, 232).

POINT II.

THE TAX IS A SUBSTITUTE FOR A PERSONAL PROPERTY TAX, AND THE BURDEN IS NO GREATER THAN SUCH A TAX WOULD PRODUCE.

Relator had in New York City during the period Bass ales of the average monthly value of $23,668.33 and bills and accounts receivable (also personal property, Sec. 2, Paragraph 8 of the Tax Law) of the average monthly value of $20,449.29. The average monthly value of the ales was arrived at by dividing the inventory value of ales as of June 30, 1918 when they had on hand at least $282,000 worth of ales (fols. 59, 60, 61). For purposes of personal property taxation therefore they had tangible personal property continuously in New York City of that value, plus the value of the bills and accounts receivable which if the average value was arrived at in the same manner would at any time total over $245,000. On this half million dollars of property it paid no local personal property taxes (fols. 61, 62) because of the exemption contained in Section 219-j of Article 9-A as follows:

> "After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property or capital stock."

At any prevailing rate the tax on this personal property would produce a figure in excess of

$826.14, the tax here assessed upon the franchise under Article 9-A.

POINT III.

THE PLAINTIFF IS NOT IN POSITION TO CLAIM UNCONSTITUTIONALITY BECAUSE OF THE LIMITATION OF ITS STOCKHOLDERS IN OTHER CORPORATIONS TO 10% OF ITS REAL AND TANGIBLE PERSONAL PROPERTY. IT MADE NO SUCH CLAIM BEFORE THE STATE TAX COMMISSION.

In *Alpha Portland Cement Co. v. State Tax Commission,* 230 N. Y. 48, the Court of Appeals, long after this proceeding was instituted, determined that stock holdings should be allowed their full value representation in the assets, which the *early* statute limited to 10%. Plaintiff did not point out to the Tax Commission this phase of unconstitutionality, nor rely upon it. Such objections must be presented clearly and specifically to the assessing officers as argued in Point IV of our brief in *Gorham Manufacturing Co. v. State Tax Commission,* No. 14, October Term 1923.

It cannot be gainsaid that the Court of Appeals declared unconstitutional the limitation of stock to ten per cent of the property of the corporation taxed. That was the determination of a Federal question, which this court may scrutinize as well, and if the court arrives at the question, it may

briefly be stated in support of the limitation, which the legislature afterwards removed, that its purpose was to exclude capital not used in the *ordinary* business of a corporation, as has been the policy of this state for many years (*People ex rel. Southern Cotton Oil Co. v. Wemple,* 131 N. Y. 64, 68; *People ex rel. Seth Thomas Clock Co. v. Wemple,* 133 N. Y. 323, 329; *People ex rel. Singer Manufacturing Co. v. Wemple,* 150 N. Y. 46, 49, 50).

The monies of a manufacturing or mercantile company invested in stocks of other companies are not working capital but surplus or reserve funds, and generally speaking a reserve fund equal to 10 per cent of the aggregate plant and real property values has been deemed by experience a sufficient safety limit for ordinary business purposes. Therefore our statute allowed only so much of a company's stock investment as would represent 10 per cent of its real and tangible personal property, and enforced the rule against both foreign and domestic corporations regardless of whether the physical property represented by the stock is located in New York State or in other states. This was not discrimination, and was not a scheme by which New York State attempted to tax property located outside its boundaries.

The determination of the New York courts should be affirmed.

Respectfully submitted,

CARL SHERMAN,
Attorney General of the
State of New York,
Attorney for State Tax Commission
of the State of New York,
Defendants in Error,
Capitol, Albany, N. Y.

C. T. DAWES,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 24.

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff-in-Error,

AGAINST

STATE TAX COMMISSION,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 14.

GORHAM MANUFACTURING COMPANY,
Appellant,

AGAINST

STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIÆ IN THE ABOVE ENTITLED CAUSE ON BEHALF OF WILLIAM WRIGLEY JR. COMPANY, A CORPORATION OF WEST VIRGINIA, TRANSACTING BUSINESS WITHIN THE STATE OF NEW YORK SIMILARLY AFFECTED WITH THE APPELLANTS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now William Wrigley Jr. Company, by its counsel, requesting permission to file the following brief as *amicus curiæ* in the above entitled cases.

Statement.

The Wrigley Company manufactures its product which consists of chewing gum, in manufacturing plants situated in the States of Illinois and New York. Its main plant is in the State of Illinois and the New York plant is auxiliary.

The Wrigley Company like the Gorham Manufacturing Company earns the major part of its income and has the major part of its assets situated without the State of New York.

The State of New York has annually assessed the William Wrigley Jr. Company, under the provisions of Article 9-A of the Tax Law of the State of New York (see Appendix Appellants' joint brief) "for the privilege of doing business in

this state" [§ 209] in the following taxable years the following amounts:

1918-19	$8,942.52
1919-20	18,864.93
1920-21	88,560.68
1921-22	41,767.38

These taxes paid have been under protest, on the constitutional grounds here presented, for the years 1919-1920. Those for subsequent years have not been paid awaiting the decision of this Court and heavy penalties (10% + 1 per cent. each month) have accrued. The Attorney General of New York is now in the position under the Statute to institute proceedings to cancel the authority to do business in that State, and the taxes are a lien on the Company's real estate as well as all other assets in New York.

It will be noted that in the taxable period 1920-21 the amount of the tax was increased $69,695.75 over the preceding period. Prior to this year the Wrigley Company had leased the building in which it manufactured its product in New York. In this period the Wrigley Company increased its assets within New York State by purchasing real property, and building thereon a factory for which it paid $644,136.87. The manufacture remained local as theretofore—the change was merely from lease to ownership. *Yet this change in title, which bore absolutely no relation to increased income, resulted in increasing the tax payable to New York, under the provisions of the Statute for this and each succeeding year, by approximately $15,965.02.* This increased tax is under Article 9A alone and does not include real estate taxes in addition thereto paid locally.

The balance of the increased tax in 1920-21 was due to increased income, which was however, only 38 per cent. greater than in the preceding year, to wit: 1919-20.

The Wrigley Company has also paid to the State of New York, for a license to do business within said jurisdiction pursuant to the provisions of § 181 of the Tax Law of the State of New York the sum of $707.44.

The percentage of the income of the Wrigley Company allocated to the State of New York by the Tax Commission for the following taxable periods (to which allotment the Wrigley Company excepts) is as follows:

1919-20	.09548%
1920-21	.31547592%
1921-22	.22722962%

During the above period, the percentage of the Wrigley Company's income actually earned within New York did not average in excess of ***four*** *per cent. of the Company's total net income, giving full allowance for manufacturing profit in New York.*

In the following states for the privilege of transacting business and/or exercising its franchises and upon its personal property the Wrigley Company paid taxes as follows:

	New York	Illinois	Massachusetts	California	West Virginia
1920.....	$18,864.93	$2,180.47	$1,247.72		$2,675.00
1921.....	88,560.68	2,700.89	423.93		2,675.00
1922.....	41,767.38	2,853.09	1,216.71		2,450.00
1923.....	41,000.00(est.)	2,916.45	3,800.78	$1,598.00	2,450.00
TOTALS.....	$190,192.99	$10,650.90	$6,689.14	$1,598.00	$10,250.00

The tax exacted by the State of New York is thus eighteen times as much as that imposed by any other single state, and six times as much as the

aggregate taxes of the other five jurisdictions combined. This notwithstanding the fact that the major part of the manufacture and sales and the greater part of the Wrigley Company's assets were outside the State of New York.

The Wrigley Company objects to the tax because a just method of ascertaining the actual net income of a foreign corporation attributable to operations within the State of New York may be more accurately and simply applied than by the present cumbersome, inaccurate and arbitrary method adopted by the State Legislature, by which the appellee, State Tax Commission, is bound.

Simple accounting methods of every corporation enable it to determine what it costs to operate its business within a certain territory. Likewise its gross and net income therefrom. Otherwise corporations would be unable to ascertain when they were operating in a given locality at a profit. Federal methods of determining exactly the same question of income situs for taxation emphasize this (Rev. Act. 1921, Secs. 217, 234; Regulations, Arts. 325, 328 and 573). As the actual income from operations within the State of New York can be thus simply determined what possible justification can there be for New York seeking to ascertain this fact by an inaccurate method which in the same breath includes items that are not revenue producing such as unimproved real property (4/5 of its New York realty is unimproved and non producing) and arbitrarily excludes cash which is the greatest revenue producing asset.

If the object of the State of New York is fairly and accurately to ascertain the net income of the corporation earned within the State of New York, and not to evolve a basis which will enable it to

collect the greatest possible tax from foreign corporations transacting business therein, why does it not limit the income allocated to that derived, at least partly, from the State and then base such allocation upon factors which determine its net income within and without the State.

The Wrigley Company resists the imposition and levy of this tax on all the constitutional grounds urged by the appellants in the joint brief, submitting:

FIRST: That the Tax Law in effect taxes income earned without the State in violation of the "due process" clause of the Constitution; for the allocation applies to the entire net income and appropriates the part thereof measured, not by any actual allocation based on reality but, by the monthly averages of certain arbitrarily selected assets, while other important factors such as cash and cash sales are disregarded; even the factors chosen not being any measure of the actual yield of any net income; resulting in a total failure to separate state earned income from that extra state.

SECOND: That the method of taxation unduly burdens inter-state commerce and is a direct burden on inter-state commerce.

POINT I.

The Wrigley Company urges that the tax is unconstitutional.

The average amount of the Wrigley Company's cash on hand in the State of Illinois from 1918 to 1921 (calendar years) inclusive, was as follows:

Taxable Period	
1918 (1919–1920)	$1,132,333.63
1919 (1920–1921)	1,743,685.98
1920 (1921–1922)	1,936,570.37
1921 (1922–1923)	2,277,806.85

The exclusion of this item by the State Tax Commission pursuant to the provisions of the Tax Law has resulted in increasing the percentage of income allocated to New York as follows:

1919 used for taxable period Nov. 1, 1920 to Oct. 31, 1921.....	.03826792%
1920 used for taxable period Nov. 1, 1921 to Oct. 31, 1922.....	.02516%

By including the factory and other real estate in New York the percentage of income of the Wrigley Company allocated to New York by the appellee, State Tax Commission, is further increased for the following taxable years as follows:

1919-20	.01685%
1920-21	.06795%
1921-22	.04579%

The New York Legislature has attempted to extract from foreign corporations the highest possible tax. This is accomplished by selecting factors for the allocation which bear no relation to income

earned and subjecting the entire net income, extra State included, to the allocating percentage. Important income producing assets, notably *cash,* are wholly excluded from the allocation while the income therefrom is included in the tax measure.

This arbitrary, unjust and inaccurate method of income determination adopted by the New York Legislature, by which the Tax Commission is bound, consequently results in treating as income earned within New York, income that, as a matter of fact, is actually earned from assets situated without the boundaries of the State.

This is a violation of the Fourteenth Amendment. There is no distinction in principle between condemning a tax on the total share value of stock of a corporation because the value of the shares is arrived at by necessarily including therein the value of property situated outside the taxing state, and condemning a tax levied upon a percentage of a corporation's income arrived at by a method which conclusively proves that part of the income so taxed is derived from assets situated outside the taxing State. Such, in substance, was the holding of this Court in *Delaware, Lackawanna and Western R. R. Co.* vs. *Pennsylvania,* 198 U. S. 341.

Judge Cardozo in the *Alpha* case (*People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48) stated in the opinion (p. 57):

> "Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income. Such, indeed, it would be in form as well as in substance, if the legislature had not stated (§ 209) that the 'privilege of doing business' was the consideration for the payment. *Nothing but that recital stands between the statute and conceded invalidity.*

> * * * The only question then is whether the method of allocation is reasonably adapted to the apportionment of income according to the situs of its origin. *The State substantially concedes that a tax on income could not stand if allocated on such a basis.*" (Italics ours.)

In the prevailing opinion in the *Alpha* case Judge Cardozo held that the only two features of Article 9A there complained of were unconstitutional as taxing property outside the State. He, however, avoided a ruling upon the constitutionality of the whole law by determining that these two features held unconstitutional were severable from the remainder of the statute. That the Court approached the consideration of the question with diffidence is shown in his opinion at page 55:

> "The power of a State to attach conditions to the transaction of intrastate business by foreign corporations is not unlimited today, whatever under earlier decisions it may once have seemed to be. The field of law is one where new rules are in the making. Only the Supreme Court of the nation can definitively fix their content. The judgment of a state court can hardly fail, in the meantime, to be tentative and groping. We must shape our path and our progress by such light as we have."

The doubts are further evidenced by the fact that the Chief Judge and an Associate Judge of the Court of Appeals dissented on the ground that the whole statute was unconstitutional, and that four Judges of the Court of Appeals held the statute unconstitutional in two particulars.

By taxing the income derived in part from property situated without New York, the State has endeavored to do indirectly that which it cannot do

directly, *i. e.*, tax property having its situs without the State. Such a course this Court has consistently and persistently refused to countenance:

Adams Express Co. v. *Ohio*, 166 U. S. 218;
Looney v. *Crane Company*, 245 U. S. 178.

Nor could the statute be properly sustained upon the "Franchise Tax" theory, because no broader taxing rights are accorded the State by such construction.

Wallace v. *Hines*, 253 U. S. 66;
International Paper Co. v. *Mass.*, 246 U. S. 135.

And, furthermore, the tax levied in no event can be so justified because the substance and not the form of the tax determines its constitutionality.

Underwood Typewriting Company v. *Chamberlain*, 254 U. S. 113;
Shaffer v. *Carter*, 252 U. S. 37.

In those instances in which this court has considered a tax unlimited as to maximum amount and computed upon a corporate property neither located nor used within the confines of the State, it has refused to sustain the tax.

International Paper Co. v. *Mass.*, *supra*;
Locomobile v. *Massachusetts*, 246 U. S. 146.

Much that has been said by this Court in construing statutes based on the unit rule, which has been expressly limited to common carriers, is equally applicable in sound reasoning and principle to the present statute.

Union Tank Line v. *Wright*, 249 U. S. 275;
Wallace v. *Hines*, *supra*.

The New York Statute also unduly burdens interstate commerce because the tax is computed on a part of its income earned in interstate commerce without the State of New York. The income of the Wrigley Company taxed rises and falls in direct relation to the interstate business transacted by the company and the lack of a maximum limit of tax in the New York Statute indicates that this is exactly the result which the New York legislature anticipated would be accomplished.

Should such a method of taxation be held constitutional, there is nothing to prevent the Legislature of other jurisdictions from enacting similar taxes. In the case of the Wrigley Company, transacting business in the States of Illinois, Massachusetts, California and West Virginia, as well as New York, the possibility of the legislatures of these states following New York, presents a real question of its possible destruction, and the words of this Court in *Western Union* v. *Kansas,* 216 U. S. 1, at page 37, become particularly pertinent:

> "It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of inter-state commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burden such commerce but by taxation upon property situated beyond its limits".

How close the State of New York has come to destroying the New York business of the Wrigley Company is evidenced by the fact that in the taxable year November 1, 1920, to October 31, 1921, the total tax of $88,560.68 is greater than the entire net income derived by the Wrigley Company from New York operations, and resulted in an actual loss.

POINT II.

The State Tax Commission is without power under the statute to remedy the situation of which complaint is made by the Gorham Manufacturing Company.

In conclusion the Wrigley Company wishes to urge, as has the appellant, that the statement of Judge Hand in the lower court in the *Gorham* case to the effect that the remedy of the taxpaying corporation is to apply for a reassessment of the tax is manifestly erroneous as no dispute is now raised concerning the figures taken by the State in reaching its allocation, but the complaint is against the exclusion and inclusion of items which the New York Commission are mandatorily obliged to either exclude or include according to the wording of the Statute; and that the factors included do not determine the yield of any net income or its rate or amount. By the express language of the statute the right to revision runs solely against the correctness of the State's figures, not against the character of the items included which determine the amount of the tax. Complaint is levelled against the character of the allocation made pursuant to the statute's direction. It is the method of taxation not the correctness of the figures which is in dispute and the mandatory provisions of the statute prevent revision as these require judicial construction as to their constitutionality.

POINT III.

The Corporation Tax Law of New York is unconstitutional; so the respective final judgments in these cases should be reversed.

Dated, New York, April 7, 1924.

Respectfully submitted,

ERNEST G. METCALFE,
RANDOLPH W. BRANCH,
Counsel for William Wrigley Jr. Company,
Petitioner.

The parties in the foregoing cases are hereby notified that the undersigned will, on Monday, the 14th day of April, 1924, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, submit the foregoing motion for leave to file a brief herein as *amicus curiæ*.

ERNEST G. METCALFE,
RANDOLPH W. BRANCH,
Counsel for William Wrigley Jr., Company.

Due service of the foregoing Notice of Motion and Brief is hereby admitted, this 7th day of April, 1924.

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Plaintiff-in-Error and Appellant.

CARL SHERMAN,
Attorney General, State of New York, Counsel for Defendant-in-Error and Appellees.

We hereby consent to the filing of the foregoing brief *amicus curiæ* herein.

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Plaintiff in Error and Appellant.

Counsel for Defendant-in-Error and Appellees.

Counsel for Parties.

GORHAM MANUFACTURING COMPANY *v.* STATE TAX COMMISSION OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 5. Argued April 21, 1924.—Decided November 17, 1924.

1. A taxpayer who has not exhausted the remedy provided before an administrative board to secure the correct assessment of a tax, will not be heard to assert its invalidity in a suit to enjoin its collection. P. 270.
2. So *held*, where a foreign corporation attacked on constitutional grounds a tax for the privilege of doing business in New York, assessed, on the basis of allocated income, under Art. 9-A of the New York Tax Law, as amended in 1918, but had failed to exercise its right under § 218 of that Article to apply for a revision and obtain a hearing before the State Tax Commission, at which it might have submitted evidence, and upon which, if it appeared that the account included taxes which could not have been lawfully demanded, the Commission would have been required to resettle the same "according to law and the facts," and adjust the tax accordingly.

274 Fed. 975, affirmed.

APPEAL from a decree of the District Court which dismissed, upon final hearing, a bill to enjoin collection of a tax. See the next case, *post*, p. 271.

Mr. James M. Beck, with whom *Mr. George Carlton Comstock*, *Mr. Robert C. Beatty* and *Mr. Harold T. Edwards* were on the briefs, for appellant.

Mr. Carl Sherman, Attorney General of the State of New York, and *Mr. C. T. Dawes*, for appellees, submitted.

Mr. Ernest G. Metcalfe and *Mr. Randolph W. Branch*, by leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Gorham Manufacturing Company brought this suit in equity in the District Court to enjoin the collection of a tax assessed against it under Article 9-A of the Tax Law of New York, alleging that the provisions of this Article were in conflict with the due process clause of the Fourteenth Amendment and the commerce clause of the Constitution. The District Court, upon final hearing, dismissed the bill. 274 Fed. 975. And this direct appeal was prosecuted. Jud. Code, § 238.[1]

This Article[2] provides that for the privilege of doing business in the State every foreign manufacturing and mercantile corporation[3] shall pay in advance an annual franchise tax, to be computed by the State Tax Commission, at the rate of three per centum, upon the net income of the corporation for the preceding year. §§ 209, 215. This net income is "presumably the same" as that upon which the corporation is required to pay a tax to the United States, § 209; but the amount thereof as returned to the United States is subject to any correction for fraud, evasion or errors, ascertained by the Commission. § 214. If the entire business of the corporation is not transacted within the State, the tax is to be based upon the portion of such ascertained net income determined by the proportion which the aggregate value of specified classes of the

[1] This case was formerly before this Court in *Gorham Manufacturing Co.* v. *Wendell*, 261 U. S. 1, in which a substitution of parties was allowed.

[2] This Article was inserted in the Tax Law (Consol. Laws of 1909, c. 60, p. 4021), by the Laws of 1917, c. 726, p. 2400, and thereafter amended by the Laws of 1918, c. 271, p. 927, c. 276, p. 938, and c. 417, p. 1259, all of which were in effect when the tax in question was assessed. The references in the opinion are to the provisions as they stood after these amendments.

[3] With certain exceptions not here material.

assets of the corporation within the State bears to the aggregate value of all of such classes of assets wherever located. § 214. The corporation shall make the Commission a report showing the State of its organization "and the kind of business transacted"; the amount of its net income for the preceding year as returned to the United States, and, if inaccurate, the amount claimed to be its net income; the value of the specified classes of its assets, within the State and wherever located; and such other facts as the Commission may require for the purpose of making the computation required. § 211. The Commission shall audit and state the account and compute the tax thereon. § 219a.

If within one year after the account is audited and stated the corporation files an application for revision, "the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally . . . exacted of any such account, the commission shall resettle the same *according to law and the facts,* and adjust the account for taxes accordingly." § 218. The determination of the Commission upon any application for revision may be reviewed, both upon the law and the facts, upon certiorari by the Supreme Court, on all the evidence, papers and proceedings before the Commission, and, if found erroneous or illegal, the account shall be corrected and restated; and from any determination by the Supreme Court an appeal may be taken to the Court of Appeals.[4] §§ 199, 219.

[4] But no certiorari shall be granted unless the full amount of the tax, interest and other charges audited and stated in the account, has been "deposited" with the State Comptroller. § 219.

The Gorham Company is a Rhode Island corporation, engaged, under its charter, in the business of manufacturing and selling silverware, bronze and metal ware. All of its manufacturing is done in Rhode Island. It has there its main office and sells its ware to customers in all the States of the Union and some foreign countries. It also has a branch office and showrooms in New York City, where it keeps on hand a stock of its ware, partly samples, makes sales to customers from such stock and takes orders for ware to be shipped from the Rhode Island factory. In 1917, however, it also engaged extensively in the manufacture and sale of munitions. No part of this business was carried on in New York.

The Company, in 1918, made a report to the Commission in compliance with the Tax Law. In this report, both as originally filed and later amended, it stated that the business which it transacted was "manufacturing and selling silverware, bronze and metal ware"; gave the amount of its net income for the year 1917 as determined by the United States, claiming only one deduction therefrom, namely, the amount paid for federal income taxes, and stated the aggregate values of the classes of its assets specified in the Tax Law, both in New York and wherever located. It did not, however, show that it was also engaged in manufacturing and selling munitions, that its net income as reported was derived to any extent from that business, or that it did not manufacture any ware in New York.

The Commission thereupon audited and stated the Company's account, and computed the tax thereon, of which it gave the Company notice.[8] The Company, how-

[8] The amount of this tax was somewhat larger than that which would result, as a matter of calculation, from the figures set forth in the Company's report. It is stated in the opinion of the District Court that the "tax as actually assessed contained a duplication of the accounts receivable." And it is conceded that the Commission did not deduct the federal income taxes from the net income.

ever, did not apply to the Commission for a revision of the account and resettlement of the tax, but, within less than one year after the account had been audited and stated, brought this suit in the federal court to enjoin the collection of the tax.

The Company insists that the inclusion in the net income upon which the tax was based of the income derived from business not carried on in New York, in the manufacture and sale of munitions and the manufacture of ware, and the allocation of that net income to New York by the statutory ratio into which only certain assets entered, has resulted in an assessment against it of a tax based upon an allocated income greatly in excess of that in fact derived from the business of selling ware which it carried on within the State. The grounds upon which it challenges the constitutionality of the law are, in substance, as summarized in its brief: (1) That a State cannot constitutionally levy a tax computed on an allocated part of the total net income of a foreign corporation, where the allocation includes certain arbitrarily selected factors, none of which are determinative of net income, and omits other factors equally important, and the result is to allot more income to the State than was earned there and employ income totally unrelated thereto to enlarge the measure of the tax; and (2) That such a tax upon the income earned without the State by a foreign corporation engaged principally in interstate commerce, is a direct burden upon such commerce.

We are of the opinion, however, that, without reference to these constitutional questions, the bill was properly dismissed by the District Court because of the failure of the Company to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax.

A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct as-

sessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity. *Farncomb* v. *Denver*, 252 U. S. 7, 10; *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710, 723; *McGregor* v. *Hogan*, 263 U. S. 234, 238; *First National Bank* v. *Weld County*, 264 U. S. 450, 455.

The Company did not report to the Commission any of the facts upon which it now challenges the validity of the tax. Its report indicated that its net income was derived solely from carrying on in New York and elsewhere the unitary business of manufacturing and selling ware. After the account had been audited and the tax computed, it was entitled, as a matter of right, to make application for a revision of the tax and to a hearing before the Commission, at which it might submit evidence; and if it appeared that the account included taxes which could not have been lawfully demanded, the Commission was required to resettle the same "according to law and the facts", and adjust the tax accordingly. The Company, however, made no application to the Commission for a revision of the tax; it submitted no evidence to the Commission as to any of the matters on which it now relies, either as to the inclusion of profits derived from the munitions business or otherwise; and it did not request the Commission to resettle the tax on the ground of any error or invalidity, in matter either of fact or law.

Under these circumstances we think that the Company, having failed to avail itself of the administrative remedy provided by the statute for the correction of the tax, was not entitled to maintain a bill in equity for the purpose of enjoining its collection.

The decree of the District Court is

Affirmed.

Syllabus.

BASS, RATCLIFF & GRETTON, LIMITED, *v.* STATE TAX COMMISSION.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 10. Argued April 21, 1924.—Decided November 17, 1924.

1. The tax imposed on foreign corporations by Art. 9-A of the Tax Law of New York, as amended, is not a direct tax on allocated income but a tax for the privilege of doing business in the State measured by allocated income of the previous year. P. 280.
2. When the business of a foreign corporation consists in a series of transactions beginning with the manufacture of goods in its home country and ending in their sale there and in other places—the profits accruing only with the sales—a State of this country in which part of the business is transacted is justified in attributing to that part a just proportion of the net profits earned by the corporation from its business as a whole during the preceding year, as a basis for a tax upon its privilege of doing local business during the year to follow. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Wallace* v. *Hines*, 253 U. S. 66, 69. P. 280.
3. A tax on a British corporation for the privilege of doing business in New York during the ensuing year computed under Art. 9-A of the State Tax Law on a portion of the total net income of the year last preceding, the portion being determined by the ratio between the value of such assets of the corporation of certain classes—real and tangible personal property, bills and accounts receivable, and shares in other corporations—as were located in New York, and the value of all its assets of those classes, *held* not arbitrary or unreasonable, and not a violation of due process of law or an unconstitutional burden on foreign commerce. P. 282.
4. A tax thus computed on allocated net income of the past year for the privilege of continuing local business during the year ensuing, should not be deemed invalid merely because the local business of the preceding year yielded no net income, especially where the state law relieves the corporation from any personal property tax. P. 284.
5. An objection to a state tax not raised before the state taxing authorities or in the state courts cannot be assigned for error and reviewed in this Court. P. 285.

198 App. Div. 963; 232 N. Y. 42, affirmed.

ERROR to a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, confirming a tax assessment.

Mr. James M. Beck, with whom *Mr. George Carlton Comstock*, *Mr. Robert C. Beatty* and *Mr. Harold T. Edwards* were on the briefs, for plaintiff in error.

I. The tax is unconstitutional as in effect taxing income and property without the State. *Wallace* v. *Hines*, 253 U. S. 66; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Fargo* v. *Hart*, 193 U. S. 490; *People* v. *Knapp*, 230 N. Y. 48; 231 N. Y. 516; certiorari denied, 256 U. S. 702; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Looney* v. *Crane Co.*, 245 U. S. 178; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *Delaware, L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113.

If a taxing measure purports to value the privilege of doing business within the State, it cannot arbitrarily inflate that value by operations which take place beyond its borders; neither can the taxing power increase the value of property which it taxes by attaching thereto some unrelated factor.

A State may not tax the property employed or the business done without the State. Neither may it tax the profits therefrom as such nor by taking them as a measure for the tax.

This statute is inherently arbitrary, and therefore invalid, because it wholly, or at least in a substantial degree, disregards realities and is thus intrinsically unworkable as a formula for allocating income, as the tax measure, with a fair degree of accuracy. Where income is the measure, the formula must be tested on the basis of the substantial (not necessarily mathematical) correct-

ness with which it divides income into state earned and extra-state earned.

A statute purporting to allocate income to the State must show a real design to accomplish that result. If it prescribes a rigid formula, leaving no discretion in the taxing authorities to correct inequalities, its validity depends upon the relation of the factors prescribed therein to this essential aim. If no such relation exists, the method is arbitrary. "Taxes must follow realities, not mere deductions from inadequate or irrelevant data." *Union Tank Line Co.* v. *Wright*, *supra*, 286.

This reasoning is in truth the fundamental basis of the unit rule which, however, has been expressly limited to common carriers, (*Adams Express Co.* v. *Ohio*, 165 U. S. 194; 166 U. S. 185), but even within its limits the unit rule has never sanctioned an arbitrary or artificial basis for computation. *Fargo* v. *Hart*, *supra*; *Meyer* v. *Wells, Fargo & Co.*, *supra*; *Union Tank Line Co.* v. *Wright*, *supra*; *Wallace* v. *Hines*, *supra*.

In those cases, as here, the taxpayer was a foreign corporation doing business in and out of the State, and the amount of property taxable was determined by a proportion of the selected local assets to their total everywhere. The tax was held void by this Court because its basis or measure included extra-state property. This fact rendered all other considerations immaterial. The inquiry was held objective and not subjective, and the formula, means, or method by which the tax was arrived at unavailing to save the statute and tax.

II. The method of apportionment prescribed by § 214 of Art. 9–A is inherently arbitrary. *Union Tank Line Co.* v. *Wright*, 249 U. S. 283.

The real value of income produced in New York cannot be ascertained with approximate accuracy by the statute

in question and the statute is therefore inherently arbitrary for the following reasons:

1. It attempts an allocation of the entire net income, rather than that local or partially within and without, and as such includes that which is foreign. Neither the allocating assets nor the income are part of "an organic system of wide extent." *Wallace* v. *Hines, supra,* 69. Being a manufacturing corporation, the presence of a plant in one jurisdiction and a store in another does not make it such a system. *Adams Express Co.* v. *Ohio,* 165 U. S. 222; *Fargo* v. *Hart, supra; Meyer* v. *Wells, Fargo & Co., supra; Union Tank Line Co.* v. *Wright, supra.* The so-called unit rule has never been applied where no part of the basic measure was in the State.

2. It allocates income from all sources, but in proportioning ratio assets arbitrarily excludes many sources from the assets by which such income is allocated.

3. The purely arbitrary and unreasonable formula is based upon the inaccurate presumption that every dollar of ratio assets everywhere has the same yield of net income.

4. Allocation is on the basis of the "average monthly values" of the ratio assets. These are arrived at by ascertaining the value in each month, adding the twelve valuations, and dividing the result.

5. An indicium of arbitrariness in the formula is its failure to recognize an unreasonable result.

The conclusion to be drawn from a study of the scheme of allocation of this law is that it bears no relation to the net income received or earned either within or without the State, as the factors chosen are not determinative of the yield of any net income, its aggregate amount or the rate of return. Any approximation to the actual is accidental. The apportionment resulting is not income earned or received in the State of New York.

III. A tax of a foreign corporation, engaged principally in interstate or foreign commerce, on its property with-

out the State, is a direct burden on such commerce and is therefore unconstitutional. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366; *Phipps* v. *Cleveland Refg. Co.*, 261 U. S. 449; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

IV. The tax is unconstitutional as based on an allocation which includes the value of shares of stocks of other corporations to the extent of ten per centum only of the real and tangible personal property. *People* v. *Knapp*, 230 N. Y. 48.

V. The reasons given in the opinion of the Court of Appeals do not sustain the statute or the tax.

The brief for the defendant in error deals with a conceded lack of any net income whatever in the State and a consequent apportionment of net income earned wholly in foreign countries. It seeks to escape the consequences of such a resort to a foreign measure for a state tax, in effect taxing income without the State, by reasoning that there were some taxable assets in the State and a tax could have been imposed thereon. Therefore, in the absence of such a lawful tax, the tax imposed by the statute may be taken as a substitute. None of the cases cited (*Shaffer* v. *Carter*, 252 U. S. 37; *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Maxwell* v. *Bugbee*, 250 U. S. 525) supports such conclusion. See *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

Mr. Carl Sherman, Attorney General of the State of New York, and *Mr. C. T. Dawes*, for defendant in error, submitted.

The State is taxing a privilege to carry on a business within its borders. It is not a tax on income, but total net income of the corporation is apportioned upon the

basis of capital invested here and business carried on here, and such apportioned net income is used as a measure of the value of the franchise. *People* v. *Knapp*, 187 App. Div. 89; 227 N. Y. 64; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm.*, 232 N. Y. 42; *New York* v. *Jersawit*, 263 U. S. 493.

Such a tax can be measured in any fashion the State desires (*Home Ins. Co.* v. *New York*, 134 U. S. 594; *Kansas City, etc., Ry. Co.* v. *Kansas*, 240 U. S. 227; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Cadwalader* v. *Lederer*, 273 Fed. 879,) but the plan, of course, must stand the test of constitutionality with regard to the result it works.

Even assuming the tax were an income tax upon corporations, if the method of taking part of entire net income produces no heavier burden than a tax upon the conduct of the business in New York measured in another way, then the statute is a fair and equitable one. *Shaffer* v. *Carter*, 252 U. S. 37; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113.

Under the New York statute all of plaintiff in error's real and tangible personal property in foreign countries, its bills and accounts receivable and corporate stocks owned in foreign countries have been assigned outside the State and operate to lessen the New York tax. Property across the seas is brought into consideration upon the same principle as has been property located in this country but outside the taxing State. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Gorham Mfg. Co.* v. *State Tax Commission*, 274 Fed. 975. See *Wallace* v. *Hines*, 253 U. S. 66; *Postal Telegraph-Cable Co.* v. *Fremont*, 255 U. S. 124; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Williams* v. *Talladega*, 226 U. S. 404; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Kansas City, etc., Ry. Co.* v. *Kansas*, 240 U. S. 227.

The tax is a substitute for a personal property tax, and the burden is no greater than such a tax would produce.

The plaintiff is not in position to claim unconstitutionality because of the limitation of its stock-holdings in other corporations to ten per centum of its real and tangible personal property. It made no such claim before the State Tax Commission. *People* v. *Knapp*, 230 N. Y. 48.

Mr. Ernest G. Metcalfe and *Mr. Randolph W. Branch*, by leave of Court, filed a brief as *amici curiae*.

Mr. Justice Sanford delivered the opinion of the Court.

This case involves the constitutional validity of Article 9-A of the Tax Law of New York under consideration in *Gorham Manufacturing Co.* v. *State Tax Commission*, No. 5, just decided, *ante*, 265.

This article[1] provides that for the privilege of doing business in the State a foreign manufacturing and mercantile corporation shall pay, in advance, an annual franchise tax, to be computed by the State Tax Commission, at the rate of three per centum, upon the net income of the corporation for the preceding year. §§ 209,[2] 215. This net income is "presumably the same" as that upon which the corporation is required to pay a tax to the United States, § 209; but the amount thereof as returned to the United States is subject to any correction for fraud, evasion or errors, ascertained by the Commission. § 214. If the entire business of the corporation is not transacted

[1] Consol. Laws of 1909, c. 60, as amended by the Laws of 1917, c. 726, and the Laws of 1918, c. 271, c. 276, and c. 417. See the opinion in the *Gorham Mfg. Co. Case*, note 2, *ante*, 266.

[2] This section is entitled: "Franchise tax on corporations based on net income."

within the State, the tax is to be based upon the portion of such ascertained net income determined by the proportion which the aggregate value of specified classes of the assets of the corporation within the State bears to the aggregate value of all such classes of assets wherever located. The classes of assets which are to enter into this ratio—hereinafter termed the segregated assets—are: real property and tangible personal property; bills and accounts receivable resulting from the manufacture and sale of merchandise and services performed; and shares of stock owned in other corporations, not exceeding ten per centum of the real and tangible personal property, which are to be allocated according to the location of the physical property representing such stock. § 214.[3] The corporation is to be exempt from any personal property tax. § 219-j.

Bass, Ratcliff & Gretton, Ltd., is a British corporation, engaged in brewing and selling Bass's ale. All its brewing is done and a large part of its sales are made in England; but it formerly imported a portion of its product into the United States which it sold through branch offices

[3] The average value of the shares of stock is taken; the average monthly value of the other assets. The entire provision as to the allocation of net income, which is here broadly summarized, is set forth in the margin of the opinion in *People* v. *Knapp*, 230 N. Y. 48, 53.

This Article also provides that the corporation shall make a report to the Commission showing its net income as returned to the United States and the matters which are to enter into the allocation of the net income; that the Commission shall state the account and compute the tax; and that, if an application for revision is made, the Commission shall grant a hearing, upon evidence, and adjust the tax, "according to law and the facts." And it further provides for a review of the determination of the Commission, upon certiorari by the Supreme Court, both upon the law and the facts; and for an appeal from the Supreme Court to the Court of Appeals. These various provisions are set forth in the opinion in the *Gorham Mfg. Co. Case.*

located in New York City and in Chicago. On its report to the New York Tax Commission—amended under protest—the Commission computed and assessed its franchise tax for the year commencing November 1, 1918. At a hearing granted on an application for revision, the Commission adhered to the original assessment. The Company then paid the tax under protest. The determination of the Commission was subsequently confirmed, upon a writ of certiorari, by the Appellate Division of the Supreme Court, 198 App. Div. 963; and the order of that court was affirmed, upon appeal, by the Court of Appeals. 232 N. Y. 42. The record was remitted to the Supreme Court, to which this writ of error was directed. *Hodges* v. *Snyder*, 261 U. S. 600.

It is undisputed that, for the year preceding that for which this franchise tax was assessed, the Company, as reported to the United States, had no net income upon which it was subject to a federal income tax. Its total net income, however, from all its business, wherever carried on, was $2,185,600.[4] The value of its segregated assets, wherever located, was: real property, $785,675; tangible personal property, $2,105,105; bills and accounts, $321,625; and shares of stock of other corporations, $845,195. Limiting the value of the shares of stock to ten per centum of the aggregate real and tangible personal property, that is, to $289,078, made the aggregate value of its segregated property, wherever located, $3,501,483. The value of its segregated assets in New York was as follows: bills and accounts, $20,449; and tangible personal property, $23,668. This made the aggregate value of its segregated property in New York $44,117. Taking the entire net income, $2,185,600, as the basis for the assessment of the tax, the Commission allocated to New York

[4] If the corporation is organized under the laws of another country it is required to state its entire net income. § 211.

the proportion thereof which the segregated assets in New York bore to the segregated assets wherever located, amounting to $27,537.68; and upon this sum computed the franchise tax, at the rate of three per centum, that is, $826.14.

The Company contends that this tax is not based upon any net income derived from the business which it carried on in New York but upon a portion of its net income derived from business carried on outside of the United States which under the provisions of the statute has been arbitrarily allocated to its New York business, and that such imposition of the tax deprives it of its property in violation of the due process clause of the Fourteenth Amendment and imposes a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution.

1. We see no reason to doubt the accuracy of the statement made by the Court of Appeals in the present case that the franchise tax imposed by the statute is "primarily a tax levied for the privilege of doing business in the State." It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year. See *New York* v. *Jersawit*, 263 U. S. 493, 496.

2. The question of the constitutionality of this tax as applied in the present case is controlled, in its essential aspects, by the decision in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120. There the Connecticut statute imposed upon foreign corporations doing business partly within and partly without the State an annual tax of two per cent. upon the net income earned during the preceding year on business carried on within the State, ascertained by taking such proportion of the whole net income on which the corporation was required to pay a

tax to the United States as the value of its real and tangible personal property within the State bore to the value of all of its real and tangible personal property. The Underwood Typewriter Company, a Delaware corporation, was engaged in manufacturing and selling typewriters and supplies. All its manufacturing was done in Connecticut, but the greater part of its sales was made from branch offices in other States. It contended that the tax was an unconstitutional burden on interstate commerce; and that it violated the Fourteenth Amendment in that it imposed, directly or indirectly, a tax on income arising from business conducted outside of the State. In support of the latter objection it showed that while 47 per cent. of its real estate and tangible personal property was located in Connecticut, resulting, under the method of apportionment of the net income required by the statute, in attributing 47 per cent. of its total net income to the operations in Connecticut, in fact about $1,300,000 of its net profits were received in other States and only about $43,000 in Connecticut. The court, in sustaining the validity of the tax, said: "But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of showing that 47 per cent. of its net income is not reason-

ably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result."

So in the present case we are of opinion that, as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business. In *Wallace* v. *Hines*, 253 U. S. 66, 69, it was recognized that a State, in imposing an excise tax upon foreign corporations in respect to doing business within the State, may look to the property of such corporations beyond its borders to "get the true value of the things within it, when they are part of an organic system of wide extent," giving the local property a value above that which it would otherwise possess, and may therefore take into account property situated elsewhere when it "can be seen in some plain and fairly intelligible way that it adds to the value of the [property] and the rights exercised in the State." This is directly applicable to the carrying on of a unitary business of manufacture and sale partly within and partly without the State.

Nor do we find that the method of apportioning the net income on the basis of the ratio of the segregated

assets located in New York and elsewhere, was inherently arbitrary or a mere effort to reach profits earned elsewhere under the guise of legitimate taxation. The principal factors entering into this allocation are, as in the *Underwood Case*, the real and tangible personal property of the corporation. We see nothing arbitrary in also including bills and accounts receivable resulting from the manufacture and sale of merchandise and services performed, or in taking average monthly values as the measure of all the segregated assets except shares of stock. And in the present case the inclusion of a portion of the shares of stock in other corporations,—none of which were allocated to New York—resulted in the Company's favor, and reduced the income allocated to New York to less than it otherwise would have been.

It is not shown in the present case, any more than in the *Underwood Case*, that this application of the statutory method of apportionment has produced an unreasonable result. The fact that the Company may not have had any net income upon which it was subject to payment of income tax to the Federal Government, obviously does not show that it received no net income from the business which it carried on in New York. There is no evidence in the record as to whether the Company received any net income from its New York business, or the amount of the profit and loss on that business, if any, either considered separately or in connection with the manufacturing business carried on in Great Britain.[5]

[5] The statement in the opinion of the Court of Appeals that the Company's "net income from the New York business was nothing", was apparently made inadvertently. There is no showing except as to the gross sales, and the "expenses", which were about one-fourth of the gross sales; nothing appearing as to manufacturing costs or other charges; and nothing from which the question of ultimate net profit or loss that entered either into the separate business in New York or into the total net income of the Company accruing from the manufacture and sale of the ale, can be ascertained.

3. Furthermore, the statutory method of apportionment not being shown to be arbitrary or unreasonable, we think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income. There is no sufficient reason why a foreign corporation desiring to continue the carrying on of business in the State for another year—from which it expects to derive a benefit—should be relieved of a privilege tax because it did not happen to have made any profit during the preceding year. This is especially true where, as in the present case, the corporation is entirely relieved of any personal property tax. See *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, 346.

4. The Company furthermore urges that in any event it should have been permitted to include in the statutory ratio the entire value of the stocks which it owned in other corporations. This contention is based upon the fact that, in the previous case of *People* v. *Knapp,* 230 N. Y. 48, it had been held that in so far as the statute provided that in the allocation of income the value of stocks of other corporations should not be taken into consideration beyond ten per cent. of the real and tangible personal property, although the entire dividend from such stocks was included in the net income which was the basis of the allocation, the statute was unconstitutional, and that the taxpayer in such case should be permitted to include in the statutory allocation the entire value of the stocks which it owned in other corporations. As to this matter it is sufficient to say that it does not appear from the record in the present case that the shares of stock which the Company owned in other corporations had yielded any dividends which were included in its total net income; and further, that this question, so far

as appears from the record, was not raised by the Company either before the Commission or the state courts, in each of which its objections to the validity of the tax were phrased in terms having no reference to this specific question. And not having been raised in the Court of Appeals or passed on by that court, it is not a question which can now be reviewed by this Court under an assignment of errors raising it here for the first time.

The judgment of the Court of Appeals is accordingly

Affirmed.

Mr. JUSTICE MCREYNOLDS dissents.